

Bargaining Power Dynamics and the Negotiation of Commercial Rights and Obligations:
A Case of Athlete Agreements

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Abstract

This qualitative case study explored how the structural power imbalance in high performance sport influenced the bargaining process and resulting commercial rights and obligations of a single Canadian national sport organization's (NSO1) Athlete Agreement. Principles comprising the doctrine of unconscionability, specifically the identification of a power imbalance between contracting parties, and the exploration of how that power imbalance influenced the terms of the contract, provided a framework to analyze factors influencing the commercial contents of NSO1's Athlete Agreement. The results of this analysis revealed that despite the overarching influence of the inherent structural power imbalance on all aspects of NSO1 and its membership, an athletes' level of commercial appeal can reach such heights as to balance the bargaining positions of both parties and subsequently influence the commercial contents of the Athlete Agreement.

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Chapter 1: Introduction

More and more Olympic-sport and amateur athletes are expressing disdain and frustration over the issue of Athlete Agreements (Buffery, 1998, para. 2).

Athlete Agreements are becoming a more complicated issue with all sports governing bodies about how you divide up these rights and who has approvals (Smith, 1998, p. A19).

[Athlete Agreements set out] a maze of rules and regulations that hinder the ability of individual athletes to grab a bigger share of the huge cash-filled Olympic pot by denying them full control over the use of their images (Kari, 2000, p. 58).

The ice dancers had been left off the national team after refusing to sign the association's Athlete Agreement, saying it unfairly infringed on their right to market themselves ("Skaters resolve", 1998, p. D6).

McBean was faced with an ultimatum of signing an Athlete Agreement she doesn't believe is fair or being left off the Canadian team ("Rowing", 1998, p. 22).

Bédard told Biathlon Canada she would sign the athlete's agreement but not the new commercial clauses, which she and her agent felt to be too broad and unclearly defined. Her request to have that section amended was denied (Stubbs, 1993, p. D1).

I would be at the forefront of supporting a union for skaters...This is ridiculous. I just think we're being manipulated for the benefit of the (International Skating Union) because they're making all the money (Patrick Chan quoted in Dimanno, 2013, para 1).

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A search for the phrase “Athlete Agreements” in the Canadian Newsstand database resulted in 70 such articles since February 1987, all touching on various controversies surrounding Canadian national sport organizations’ (NSOs) use of their respective Athlete Agreements. Athlete Agreements are the contracts governing the legal relationship between Canada’s high performance athletes and their NSOs. These contracts prescribe specific training and competitive responsibilities, doping guidelines, and commercial rights and obligations to which athletes must adhere, and in return, they require NSOs to provide their athletes with detailed selection criteria, an appeal process for disputes, and funding to help compensate for athletes’ training, travel, and living expenses (AthletesCan, 2009).

The use of the Athlete Agreement has been a source of controversy in the media since 1987, and even earlier in academic literature (Beamish & Borowy, 1988; Kidd & Eberts, 1982). The main underlying issue provoking such controversy was the lack of bargaining power afforded to high performance athletes in negotiating their Athlete Agreements (Beamish & Borowy, 1988; Kidd & Eberts, 1982). Bargaining power refers to an individual’s or group’s ability to favourably influence the terms of a contract through the negotiation (Barnhizer, 2005). In reference to Canada’s high performance athletes, it is suggested that they are not able to influence the terms of their Athlete Agreement, nor the negotiation process, due to the fact that no formal bargaining process takes place (Beamish & Borowy, 1988; Peel, 2010). This lack of a bargaining process and to a greater extent, lack of bargaining power has been attributed to a structural power imbalance in high performance sport which derives from NSOs’ monopoly over high performance sport in Canada.

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Similar to professional team sport governing bodies¹ such as the National Hockey League, National Basketball Association, National Football League, and Major League Baseball, NSOs have a monopoly over their sport which allows them to exercise a considerable amount of power over the terms and conditions in the contracts. Although the extent of NSOs' power in comparison to that of professional sport governing bodies widely varies as a result of certain legal protections that limit professional governing bodies' power; the application of the fundamental principles of contract law to govern the legal relationship between the governing bodies and their athletes is uniform across all such sport governing bodies. These fundamental principles assume that the terms in the contract are bargained for in good faith, and mutually agreed upon by both parties (Fridman, 2006). This assumption holds true through the mandatory collective bargaining that takes place between the leagues and the players' unions in professional sport (Kirke & Dick, 2000). In high performance sport in Canada, Beamish and Borowy (1988) argued that this is not the case, as NSOs unilaterally draft the Athlete Agreements and oftentimes impose them on the athlete without offering an alternative. This type of contract is known as a standard form contract, a non-negotiable contract drafted by one party and presented to the other party in many circumstances on a take-it-or-leave-it basis (Marotta-Wurgler, 2007). It has been noted that the use of standard form contracts by a monopoly creates an imbalance in bargaining power that is antithetical to the fundamental principles of contract law (Foster, 2003; Greenhow, 2008; Hanlon, 2006). According to Foster (2003), "the power relationship between a powerful global

¹ A sport governing body refers to an organization that is given the exclusive mandate to govern sport in a particular domain.

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international sporting federation, exercising a monopoly over competitive opportunities in the sport, and a single athlete is so unbalanced as to suggest that the legal form of the relationship should not be contractual” (p. 16).

The inequality of the contract bargaining process and exploitative nature of specific agreements administered at the professional and collegiate levels of sport have been studied for many years (Baker, Grady, & Rappole, 2011; Brand, 2006; Gallant & Staudohar, 2003; Hanlon, 2006; Johnson, 2005; Kovach, Ricci, & Robles, 1998; Mitten & Davis, 2008); however, minimal research has focused on the contract and negotiation process of the Athlete Agreement between NSOs and athletes, and more specifically, Canadian high performance athletes.

Kidd and Eberts (1982) initiated the discussion of the inequality of the athletes’ bargaining position in the negotiation of their Athlete Agreement. Subsequent work led to a focus on the injustice high performance athletes were facing (Beamish & Borowy, 1988), most notably in terms of the invasive nature of doping policies (Beamish, 1990; Greenhow, 2008; Jackson & Ritchie, 2007) and the mandatory arbitration clause (Bitting, 1998; Blackshaw, 2009; Weston, 2009) over both of which the athletes had no influence. In the wake of the current hyper-commercialization of the Olympic sport industry, coupled with the widespread commodification of the high performance athlete, a growing concern for high performance athletes is the limited freedom to exploit their image for personal gain (Buffery, 1998; Ferrari, 2004; Findlay & Ward, 2006; MacMillan, 1991, Peel, 2010). Commercial clauses, requiring athletes to waive some, if not all, of their image rights, are now commonplace in the typical Athlete Agreement. These clauses enable NSOs to leverage athletes’ images, likenesses, and personalities as commodities to

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attract corporate sponsors to the organization, while concomitantly limiting athletes' opportunities to exploit those same assets for their own gain (Chalip, Johnson, & Stachura, 1996; Walsh & Giulianotti, 2007).

Since Macmillan's thesis on athletes' rights in 1991, no empirical studies have examined how the power imbalance between NSOs and individual athletes affect the commercial opportunities of Canadian high performance athletes. Furthermore, the contemporary importance of this issue is heightened due to the diminishing number of corporations that are willing to spend money on sport sponsorship (Sentilles, 2008). In an attempt to fill this gap in the literature, this study explored how the structural power imbalance in high performance sport influenced the bargaining process and resulting commercial rights and obligations of an NSO's Athlete Agreement. To achieve this initiative, the study conducted a case study using a single NSO, evaluating the effects of how the structural power imbalance in high performance sport influenced the drafting and negotiation of the commercial rights and obligations contained in the selected NSO's Athlete Agreement.

In conducting this study the following research questions, and sub-questions, guided the inquiry:

- 1) How are the commercial rights and obligations within the Athlete Agreement decided?
 - a. To what extent is each party involved in the drafting and negotiation processes of the Athlete Agreement?
 - b. What effect, if any, does the commercial appeal of an athlete have on the commercial constraints within his or her Athlete Agreement?

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- 2) What are each party's perceptions of the results of the initial drafting and negotiating processes of the commercial rights and obligations in the Athlete Agreement?

Context

In order to understand the unique context of this phenomenon, two avenues of investigation were explored in the literature review that follows. First, the contractual basis of high performance sport was critiqued and second, legal safeguards developed to protect individuals (exclusive of high performance athletes) from commercial exploitation were examined. The former focuses on an essential contradiction inherent in high performance sport. This contradiction is that the *sine qua non* of a traditional contract is that the parties are of equal bargaining power, however, this is antithetical to monopoly power, by definition, and monopoly power is a characteristic of high performance sport. The second section built upon the first by exploring how in other instances where there had been monopoly power, legal safeguards were developed to protect the weaker and more vulnerable party from exploitation.

Delimitations

The following delimitations have been consciously made throughout the development of this study in order to limit its scope.

- 1) This study focused on the Athlete Agreement between athletes and their respective NSOs exclusively. This study was not concerned with the Athlete Agreement between Athletes and the Canadian Olympic Committee even though that contract contains similar constraints as the NSO/athlete Athlete Agreement.

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2) The Athlete Agreement imposes several constraints on an individual athlete, however for the purpose of this study only the commercial constraints in the Athlete Agreement were analyzed. Any discussions over other constraints were avoided to maintain the focus of the study.

Limitations

The following limitations constrained the amplitude of this study. As a result of specific time restraints and limited funding, both of which were beyond the control of the researcher, this study was limited to only sampling a very small portion of the population. In the Canadian high performance sport system, there are 60 NSOs, each of which administers its own Athlete Agreement, and over 1,600 high performance athletes (Sport Canada, 2012). However, this study only explores the drafting and negotiation process of one NSO, and five high performance athletes who are members of the selected NSO. By having such a small sample size, the results of this study are not representative of the high performance sport context. However, Yin (2003) suggested that the purpose of case study research is not to generalize findings; rather it is to test a specific theory in a given context to contribute to knowledge and theory building which can help direct future investigations in an entire field.

Chapter 2: Literature Review

Section 1: The Antithetical Nature of the Contractual Basis of Sport

The use of contracts is generally acknowledged as the basic legal relationship between NSOs and their members, and is embedded in virtually all aspects of the operation of sport (Barnes, 1986; Beamish & Borrowy, 1988; Beloff, Kerr, & Demetriou, 1999; Corbett, Findlay, & Lech, 2008; Gardiner, James, O'Leary, & Welch, 2006; Kidd & Eberts, 1982). Notwithstanding the ubiquitous nature of contracts in sport, it is not clear that the use of contract law to govern these relationships is an equitable form of governance (Foster, 2003). At all levels of sport competition, including professional, collegiate, and high performance sport, studies have identified problems associated with governance by contract (Boyes, 2000; Findlay & Ward, 2006; Hanlon, 2006; Kidd & Eberts, 1982; MacMillan, 1991). The fundamental concern is the inequality of bargaining power in the formation of these contracts, wherein the governing bodies possess most, if not all, of the bargaining power in the contract negotiation process with its athletes. This imbalance can largely be attributed to the monopoly control governing bodies have over athletes, enabling them to unilaterally impose contracts and, in so doing, most often favour their own interests. Unilateral control over contracts in the context of a monopoly is arguably antithetical to the fundamental principles of contract law (Foster, 2003; Hanlon, 2006; Kessler, 1943).

This chapter begins by discussing how the structural power imbalance in high performance sport provides Canadian NSOs with monopoly power over their respective sports, followed by an exploration of the contract governing high performance athletes (known as the Athlete Agreement) and the extent to which NSOs' monopoly power influences its content. The next section explores the evolution of the law of contract and

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the legal complications when a monopoly employs a 'standard form' contract, a common form of contract in sport. This chapter highlights the conflicting nature of the contractual basis of sport.

The structural power imbalance. The structural power imbalance in high performance sport refers to how the structure (i.e., the organization and operation) of the high performance sport system creates a bargaining power advantage for sport governing bodies over athletes (Foster, 2003). This power imbalance is the product of a chain of contractual relationships recognizing specific sport governing bodies as the sole authority to govern their sport at each level of the high performance sport hierarchy. This sole authority can be better understood as monopoly power.

Sport governing bodies as monopolies. Sport governing bodies possess monopoly power over their respective sports (Boyes, 1998; Foster, 2000; Koller, 2008; Neale, 1964; Smith & Stewart, 2010). According to Foster (2000), monopoly power in sport is characterized by sport bodies that exhibit the following three traits: they are recognized as the sole authority over a sport within a defined jurisdiction, they provide a unique product that offers the athlete no substitute, and they prescribe eligibility requirements that must be met to warrant membership.

The monopoly power that sport governing bodies possess derives from the international sport governing bodies atop the high performance sport hierarchy, and filters down to the national, provincial, and local levels through a chain of contractual relationships (Wong, 1994). For example, as the supreme authority of the Olympic

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Movement,² the International Olympic Committee (IOC) has monopoly power over all high performance sport bodies involved with the Olympic Games. International Sport Federations (IFs) are only established as the international governing body for their respective sport if the IOC recognizes them as such, thus prescribing them with the authority to govern their sport at the Olympic Games (Olympic Charter, 2011, p. 16). The authority prescribed by the IOC includes IFs' ability to approve the selection of NSOs as the sole national governing body in their respective countries. Thus, Canadian NSOs are afforded monopoly power over the nomination of athletes to participate in international competition in their sport in Canada, as a result of their membership with their respective IF (Mitten & Davis, 2008).

In the Canadian high performance sport system, the monopoly power each NSO possesses provides them with the power over the operation of its sport including the sole authority to select and govern Canadian high performance athletes (Sport Canada, 2009a). Thus each NSO is the sole gatekeeper to Canadian high performance athletes wishing to compete at the international level. There are no alternatives for high performance athletes to take in their quest to compete at internationally sanctioned competitions, including the pre-eminent international competition, the Olympic Games. In order to compete, athletes must be members of their NSO, and to obtain membership they must meet the eligibility requirements of the organization, and accept and abide by the rules and bylaws set out by it. The athlete formally becomes a member of his or her respective NSO once he or she officially contracts with the NSO (Sport Canada, 2009a).

² Olympic Movement- "Under the supreme authority of the International Olympic Committee, the Olympic Movement encompasses organisations, athletes and other persons who agree to be guided by the Olympic Charter"(Olympic Charter, 2011, p. 13).

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Although the athlete and the NSO are the only parties to the contract, the chain of contractual obligations within the contract typically extend from the NSO, to the corresponding IF, and IOC, therefore subjecting the athlete to the jurisdiction of his/her IF, and/or the IOC for certain matters. This contract establishing an athlete's membership to his or her NSO, and affiliation to the corresponding IF, and the IOC, is known as the Athlete Agreement.

The development and use of the Athlete Agreement. The Athlete Agreement sets out the rights and obligations of both the athlete and NSO, concerning such issues as training requirements, living arrangements, selection criteria, athlete funding, and also specified protocol to be followed in the event that those obligations were not met (Beamish & Borowy, 1988). The Athlete Agreement was originally developed and implemented by Sport Canada to formalize the process of athlete funding and obtain further control over the athletes' training and living conditions. The impetus behind this enhanced control was to ensure Sport Canada was getting its value for its direct funding support of athletes through the Athlete Assistance Program³ (AAP) (Beamish & Borowy, 1988). Only the athlete and his or her respective NSO were parties to the contract, although the contents of the Agreement were subject to the approval of Sport Canada. In 1984, Sport Canada developed a general framework for such contracts dictating a number of mandatory requirements and allowing NSOs to include other related clauses provided they did not conflict with the requirements set out by Sport Canada (Beamish & Borowy,

³ The Athlete Assistance Program (AAP) is a national-level funding program run by Sport Canada that aims to assist Canadian high performance athletes, who have been nominated by their NSO and approved by Sport Canada, in reaching their training and competitive goals (Sport Canada, 2009a).

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1987). Athlete Agreements were presented by the NSOs to the athletes on a “take-it-or-leave-it” basis. In other words, Athlete Agreements were unilaterally developed by the NSO and imposed on the athletes with only two options, accept the terms and conditions of the contract and ensure their eligibility to compete in international competitions or decline the terms and conditions and forfeit their opportunity to compete at international competitions (Beamish & Borowy, 1988).

The content of current Athlete Agreements has changed since 1984 (as is examined further in section 2 of this chapter) and there is evidence athletes now have at least some input into the development of the Athlete Agreement. Nonetheless, the monopoly power of NSOs continues to enable them to dictate the bulk of the contents of the contract and present the contract on a “take-it-or-leave-it” basis. Contracts such as this, which are presented on a “take-it-or-leave-it” basis, are known as “standard form” contracts. It has been argued that the use of such contracts by monopolized governing bodies is antithetical to the principles of contract law (Foster, 2003; Hanlon, 2006; Kessler, 1943).

The law of contract. A contract is essentially a legally enforceable agreement between two or more persons that sets out specific rights and obligations of the parties involved (Fridman, 2006). The law of contract “determines which agreements are enforceable and regulates those agreements, providing remedies if contractual obligations are broken” (Koffman & Macdonald, 2007, p. 1). Contracts can be formed orally or in writing, and the obligations of the parties may be expressed or implied (Fridman, 2006; Koffman & Macdonald, 2007). Regardless of how contracts are formed, they will not be deemed legally enforceable unless it can be demonstrated that, during the contracting

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process, a bargained-for-exchange ensued in which one party makes a promise to the other party in exchange for specific consideration that will be provided once the promise is carried out (Corbett et al., 2008; Fridman, 2006; Hanlon, 2006). The area of law known as ‘contract law’ provides a framework for the enforcement of these promises and obligations. Although it may be trite to say that contractual relationships are governed by contract law, there exists an ongoing debate within socio-legal literature regarding the development and purposes of the law of contract (Bix, 2008; Fridman, 2006; Hillman, 1997; Klass, 2008; Koffman & Macdonald, 2007). According to Beatson and Friedmann (1995), Commonwealth countries, such as Canada, are witnessing a transition from the traditional theory of contract law to a more integrative modern theory. This transition has led to debate concerning the appropriate use of contracts. At the centre of this ongoing debate rests the question of why certain contracts should be enforced while others should not and, why the state should regulate the development and content of some contracts but not others (Hillman, 1997).

Traditional contract law. The main substance of contract law was developed during the nineteenth century and early part of the twentieth century throughout common law jurisdictions including the UK, the US and Canada (Cassels, 1993; Hurst, 1956). During this period, a majority of the judiciary took a *laissez-faire* approach to contract law whereby they interfered as little as possible with the contractual deals bargained by parties (Atiyah, 1989). They believed the purpose of the judiciary was to enforce agreed upon contracts and to assist an aggrieved party in the case of a breach of contract (Atiyah, 1989). Fundamental to the traditional model of contract law was the assumption that parties who voluntarily enter into contracts are equally capable of protecting their own

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interests and will seek to maximize their own gains (Cassels, 1993). As such, the court provided contracting parties with almost unlimited freedom of contracting and the foundations of contract law were built on the ideology of “freedom of contract” (Atiyah, 1989). According to Beatson and Friedmann (1995), this ideology emphasizes the ability of contracting parties to “act as private legislators and to legislate rights and duties binding upon themselves” (p. 7). Thus, as long as the parties agreed to the contract and there was no violation of the law or public policy, the courts would not intervene into any argument of fairness or reasonableness. The court paid very little attention to the content of the agreement, focusing rather on establishing whether a contract had been entered into voluntarily (Beatson & Friedmann, 1995; Ciccolella, Sharp, & Krueger, 2008). In evaluating whether a contract was entered into voluntarily the courts only deemed a party’s consent involuntary if the contract was entered under duress. Under the legal doctrine of duress, courts would find consent involuntary and subsequently the contract invalid, if the contract was procured as a result of actual or threatened violence (Ben-Ishai & Percy, 2009).

Although the approval of this non-intrusive approach by the courts was widely accepted, scholars have identified how it created inequalities amongst contractual relationships (Beatson & Friedmann, 1995; Eisenberg, 1984). Beatson and Friedmann (1995), for example, argued that traditional contract law “offered considerable advantages to the powerful and the knowledgeable, while posing substantial risks to the ignorant and the unwary” (p. 11). This power differential, it was suggested, existed because of the court’s reluctance to consider situational factors that may have shaped the contract. Eisenberg (1984) argued that by ignoring situation-specific variables, such as

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social and economic pressures underlying the parties' intentions and circumstances, the traditional model of contract law indirectly assumed that parties have relatively equal bargaining power. This assumption is at the centre of the arguments of those who assert that the traditional model of contract law is incompatible with the nature of contractual relationships in sport (Davis, 1997; Hanlon, 2006; Melear, 2003; Riella, 2002). Many authors have identified a significant imbalance of bargaining power existing between athletes and their sport governing bodies (Beamish & Borowy, 1988; Brand, 2006; Kidd & Eberts, 1982; Hanlon, 2006; Mitten & Davis, 2008). The foundation of the imbalance these authors identify is the structural power imbalance in high performance sport as previously referenced, and the main issue raised by the authors is that, because the athlete has little to no input in the drafting of the terms of the contract, this imbalance can dramatically and unfairly affect the content of the Athlete Agreement. Moreover, as Foster (2011) identifies, the influence of the structural power imbalance on athletes bargaining position is heightened when the Athlete Agreement and high performance sport system are understood from a traditional contractual perspective wherein the sport organization has significant authority over the affairs of the organization:

The traditional legal view of sporting bodies was that they are private clubs, admitting whosoever they wish, and autonomous in their administration. This view meant that many legal principles were not applicable. The resulting danger was that power could be exercised, especially over players, in arbitrary and non-accountable ways (p.25).

In acknowledging how the lack of regulation of the structural power imbalance places the athletes in an inequitable bargaining position, it would appear these authors are

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suggesting that the courts adopt the ‘modern’ approach to contract law in dealing with contract disputes in the context of sport.

Modern contract law. Modern contract law emerged as courts began to recognize that inequalities between contracting parties existed where one party was forced to enter into a contract because of social pressures, economic pressures, or both (Atiyah, 1989). The increasing awareness of these bargaining inequalities was attributed, in part, to the emergence of standard form contracts (Atiyah, 1989). According to Becher (2008), standard form contracts, otherwise known as contracts of adhesion, are nonnegotiable contracts that are developed by one party and presented to the other party, typically on a 'take-it-or-leave-it' basis. The intent behind the use of this type of contract is to use the same contract in multiple transactions with a range of different parties, including those who had no influence over, or even involvement in, the drafting of the content or were identified as potential parties at the time of the drafting process (Mulcahy, 2008).

Courts have identified that these contracts create an irreparable unfairness using the traditional “freedom of contract” approach, and that judicial intervention is necessary to protect weaker or more vulnerable parties (Atiyah, 1989). In *Floyd vs. Couture*,⁴ the Court wrote at paragraph 90:

the freedom of contract doctrine sanctioned agreements even where there was unequal bargaining power between the parties and the settlement was substantially unfair. The doctrine failed to distinguish between unequal outcomes which were the result of a fair bargaining procedure, and those which were the

⁴ [2004] AB.Q.B. 238

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result of exploitation. Later, the courts found this to be unacceptable, and the doctrine of unconscionable agreements began to surface in court decisions.

According to Eisenberg (1984), the modern theory of contract law recognizes the need for courts to explore more thoroughly the context of the contract. Unlike the traditional theory of contract law, the modern theory enables courts to assess relational tensions that may have influenced the content of the agreement (Eisenberg, 1984). Davis (1997) argued that the modern theory of contract law balances the individual autonomy of contracting parties, accepting their right to form private agreements, while ensuring some degree of fairness by assessing the outside social factors, public policy, and community values; all impacting the bargaining process (Davis, 1997).

The continuing transition from the traditional theory of contract law to the modern theory of contract law has been marked by the implementation of both legislation and changes in judicial approaches aimed at controlling procedural and substantive fairness in contractual relationships (Mulachy & Tillotson, 2004).⁵ Procedural fairness deals with fairness during the bargaining process. Substantive fairness involves assessing the fairness of the content of the contract that was bargained. Mulachy and Tillotson (2004) argued that the courts readily intervene in procedural issues but are reluctant to do so over substantive issues. Nonetheless, legislative efforts have attempted to target such issues. Canadian legislation, such as federal and provincial employment standards legislation, was developed to protect employees from powerful employers. This

⁵ The Canadian Sport Dispute Resolution Centre of Canada's (SDRCC) decisions are demonstrative of the aforementioned transition. The SDRCC has intervened in several selection and discipline disputes regarding substantive issues. See *Badminton Canada and Milroy v. Canadian Olympic Committee*, SDRCC, July 2004; *MacGillivray v. Swimming/Natation Canada*, SDRCC, July 2004.

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legislation protects employees by mandating specific (substantive) content for all employment contracts. Mulachy and Tillotson (2004) further identified consumer-protection policies, landlord-and-tenant statutes, and sexual discrimination and 'equal pay for work' statutes, as other examples of legislation that has been implemented to regulate substantive unfairness.

In an attempt to regulate the procedural unfairness that was evident amongst many parties employing standard form contracts, the courts have modified a number of specific doctrines, including the doctrine of unconscionability (Fridman, 2006). This doctrine evolved to allow courts to rescind a contract in which it can be demonstrated that there existed an inequality of bargaining power between parties. According to Fridman (2006), inequality of bargaining power exists when:

advantage was taken knowingly, of a gullible, ignorant, or particularly vulnerable or susceptible party, that there was some dire need on the part of the victim which rendered him [her] incapable of making a sound decision, that his [her] emotional state was such that he [she] could not appreciate and weigh the advantages and disadvantages of the contract, and that he [she] was not allowed or encouraged to seek independent advice. (p. 324)

The modern application of the doctrine of unconscionability was first established by Lord Denning in 1975, in his judgement in *Lloyd's Bank v. Bundy*.⁶ Here, the contract between Lloyd's Bank and Bundy was rescinded on the basis that the contract was unconscionable. Over time, the principles set out in *Bundy* evolved into a common law

⁶ [1975] QB 326

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test for unconscionability. The current test applicable in Canada was expressed in 2005 by the Ontario Superior Court of Justice in *Eckstein v. Jones*⁷ at paragraph 57 as follows:

In order to establish unconscionability one must show two things:

- (a) that the terms are very unfair or that the consideration is grossly inadequate, and
- (b) that there was an inequality of bargaining power between the parties and that one of the parties has taken undue advantage of this.

This test involves both “substantive” and “procedural” elements. The former focuses on unfair, or one-sided, results. The latter focuses on oppression due to unequal bargaining power. According to the California Supreme Court in *Discover Bank v. Superior Court*,⁸ a leading case on unconscionability in the United States,

the procedural element of an unconscionable contract generally takes the form of a contract of adhesion, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it. Substantively unconscionable terms may take various forms, but may generally be described as unfairly one-sided. (para 160)

According to Fridman (2006), unconscionability can be found where a family member takes advantage of another based on a known emotional weaknesses, where the weaker party has a mental or physical condition that is exploited by the stronger party, and, of greater interest to this review, cases in which the weaker party is dependent on the

⁷ [2005] ON S.C. 30309

⁸ [2005] Cal. 4th (36) 148

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stronger party due to the monopoly such party has. This monopoly power gives the weaker party little to no choice but to contract with the stronger party regardless of the onerous nature of such contract.

A recent case heard by the Court of Appeal for Ontario affirms the use of the test for unconscionability in Canada, and also demonstrates the transition towards a modern contract law approach being adopted in Canadian courts. In *Birch v. Union of Taxation Employees, Local 70030*,⁹ the court applied the test set out in *Eckstein v. Jones* to determine whether the standard form contract entered between an individual and a governing body with monopoly power, was unconscionable. In deliberating their judgement, the court restated the test set out in *Eckstein* that “determination of unconscionability involves a two-part analysis – a finding of inequality of bargaining power and a finding that the terms of an agreement have a high degree of unfairness” (para. 45). In this case, the court identified that a bargaining power imbalance existed, however, to the detriment of the plaintiff, they found that no unfair advantage was taken of the weaker party by the stronger, therefore, dismissing the unconscionability claim. This decision is demonstrable of the Canadian courts transitioning away from the traditional contract law approach, which would have neglected to consider substantive issues (i.e., the fairness of the agreement itself) when deliberating on the case (“Enforceability”, 2009).

The change in judicial approach reflecting the modern theory of contract law involved many judicial decisions moving away from the concept of “freedom and sanctity of contract, voluntary agreement, and fixed rules...towards notions of fairness,

⁹ (2008) O.N.C.A., 809

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reasonableness, and judicial discretion” (Mulachy & Tillotson, 2004, p. 40). Nonetheless, Mulachy and Tillotson (2004) suggested that this transition is not complete, as there exists a continuum between those courts that practice traditional contract law and those that have made the transition to the modern contract law theory. While there are adherents at both extremes many courts find themselves somewhere in between. The inconsistency in judicial approach has been identified by several socio-legal researchers as it relates to contract disputes in sport. Davis (1997), Hanlon (2006), and Riella (2002) all argued that specific contract disputes between collegiate athletes and their governing bodies (i.e., NCAA schools) would have resulted in more favourable outcomes for the athletes if the particular courts had been adherents to the modern rather than the traditional theory of contract law. They argued that since the modern theory model enables the courts to address issues of procedural unfairness in the formation of the contract, the apparent inequality and clear superior bargaining power that NCAA athletes face (in comparison to the NCAA and their member institutions), the case could have turned in favour of the athletes. They further argued that certain terms in the agreement, such as those allowing a school to revoke scholarship funding without cause, make the contract substantively unfair and one-sided to the extent that the contract may have been found unconscionable using a modern contract approach.

Although it would appear that the transition towards the modern contract theory has not surfaced in a decision regarding high performance sport, Foster (2011) suggests that knowledge of this transition, or even the threat of legal action, may be all that is required to influence sport governing bodies to adapt their bargaining processes to address the influence of the structural power imbalance. According to Foster (2011):

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the changing external environment of law and litigation can produce important internal adjustments without the need for direct legal intervention. Intervention by judges through litigation, or even just the threat of it, can force governing bodies to rethink their rules and practices. The threat of regulatory intervention by the state can have the same effect (p. 10).

The use of standard form contracts by a governing body with monopoly power. According to Marrotta and Wurgler (2007), 99% of today's commercial contracts are standard form contracts. This statistic is reflective of the general acceptance of the use of these contracts. However, regardless of their prevalence in the marketplace, the use of standard form contracts is carefully scrutinized by legal scholars for the following reasons. On the one hand, some critics argued that the use of these contracts is inappropriate as it creates an inevitable bargaining power imbalance which forces the adhering party to accept unfair terms to which they have not voluntarily agreed (Llewelyn, 1931; Rakoff, 1983; Slawson, 1971; Fried, 1981). On the other hand, research by Posner (1992), suggested that the drafting party is more likely to use its bargaining power advantage to seek out monetary gains rather than to insert unfair terms that reduce the value of the contract to the adhering party. In other words, the dominant party is actually less likely to abuse the adhering party.

Other scholars (Cruz & Hinck, 1996; Hillman & Rachlinski, 2002; Korobkin, 2003) objected to the use of standard form contracts because of an information asymmetry that exists between the contracting parties that, in turn, allows the drafting party to insert specific restrictive clauses that often go unnoticed by the adhering party.

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Such restrictive clauses go unnoticed because of time constraints or intentionally ambiguous language used by the drafting party. Gazal-Ayal (2007) argued that a monopoly party will not abuse its power to the detriment of its adherents when all adherents read and fully understand the standard form contract. However, he further demonstrated that it is very rare that all adherents take the time to read the contract, or necessarily have the capacity to understand the contract. In the absence of adherents reading and understanding the contract, he argued, “a monopoly (party) is always encouraged to offer sub-optimal terms” (p. 119). Gazal-Ayal’s position has been criticized by other researchers who argued that, even if only a few adherents fully read and understand the contents of a standard form contract, the drafting party will actually be influenced by those few adherents, and as a result, will not abuse their power to the detriment of the adhering party (Gillette, 2004; Schwartz & Wilde, 1979; Trebilcock & Dewees, 1981).

Finally, a number of scholars suggested that the use of standard form contracts by governing bodies in the position of a monopoly can create inoperable contractual relationships (Cooter & Ulen, 1997; Foster, 2003; Greenfield & Osborn, 2007; Kessler, 1943). Greenfield and Osborn (2007) support the finding by Lord Diplock in *Schroeder Music Publishing Co Ltd v Macaulay*¹⁰ where he distinguishes between two types of standard form contracts, the first are those standard form contracts that are of ancient origin and are the product of several bargains over a long period of time; these contracts can be effectively used by a monopoly without disadvantaging the consumer. The second type of standard form contract, are those seen in modern society that are not a product of

¹⁰ [1974] All ER 616

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a bargaining process over time, rather they are unilaterally drafted by the party whose bargaining power enables it to offer the contract on a take-it-or-leave-it basis. This second type is argued to create an irreparable bargaining power imbalance that is antithetical to the principles of freedom of contract. Kessler (1943) and Cooter and Ulen (1997) argued that the 'freedom of contract' becomes a one-sided privilege when courts support the use of standard form contracts by monopolies. They contended that this privilege fosters the ability, and in fact, drives monopolies to impose unreasonable constraints that exploit their consumers through the contracting process. As a result of this inequality, Kessler (1943) and Cooter and Ulen (1997) believed that monopolies should be restricted from using standard form contracts. Foster (2003) supported Kessler's (1943), and Cooter and Ulen's (1997) view, as it relates to the inequality of bargaining power in high performance sport. As noted by Foster (2003):

although the relationship between an international sporting federation and an athlete is nominally said to be contractual, the sociological analysis is entirely different. The power relationship between a powerful global international sporting federation, exercising a monopoly over competitive opportunities in sport and a single athlete is so unbalanced as to suggest that the legal form of the relationship should not be contractual. (pp. 15-16)

In conclusion, the use of a standard form contract, such as an Athlete Agreement, to govern contractual relationships in a monopolized market, as the high performance sport system in Canada can be described, creates a situation that enables NSOs to take advantage of athletes. A few researchers (Beamish & Borowy, 1988; Blackshaw, 2009; Kidd & Eberts, 1982; Mitten, 2009; Weston, 2009) argued that NSOs are taking

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advantage of high performance athletes, as evidenced by specific constraints imposed upon them in their Athlete Agreement. Moreover, the same researchers suggested that unless high performance athletes are able to obtain further protection from the powers of their respective NSOs, they will continue to be oppressed within the high performance sport system. Previous studies identified specific constraints that are a product of NSOs abusing their power, such as mandatory arbitration clauses¹¹ (Bitting, 1998; Blackshaw, 2009), and strict liability anti-doping clauses (Houlihan, 2004; Jackson & Ritchie, 2007). Another constraint in the Athlete Agreement that has been identified as problematic, but has yet to be fully explored is the constraints on athletes' commercial opportunities (Ferrari, 2004; Findlay & Ward, 2006; Peel, 2010; Weston, 2009).

Section 1 of this chapter explored the contractual nature of high performance sport focusing on the underlying controversy of monopolized sport governing bodies employing standard form contracts. In concluding this section, some of the various constraints imposed on high performance athletes through these standard form contracts were identified. The following section of this literature review focuses on these constraints, more specifically on those restricting athletes' commercial opportunities, and explores whether there are legal safeguards in place to protect those opportunities.

¹¹ Blackshaw (2009) explored the contract implications that arise because of the mandatory arbitration clause imposed on athletes through an Olympic participation agreement. He argued that the mandatory arbitration clause is unenforceable because the athletes do not freely consent to that clause rather it is imposed on them as a precondition to participation. The same argument could be made for the mandatory final and binding arbitration clause that exists in all Canadian Athlete Agreements.

Section 2: What is Protecting High Performance Athletes from Commercial Exploitation?

The purpose of this section is to explore the unique position Canada's high performance athletes' face in terms of their lack of legal protection for their commercial rights. In order to explore the athletes' position, this chapter begins by identifying how the Athlete Agreement is restraining athletes' commercial opportunities, followed by a comparison of how their legal protections differ from that of industry employees and professional athletes. The last section of this chapter explores various solutions to the athletes' lack of legal protections that have been proposed by other authors.

Athlete Agreements exploit high performance athletes' commercial rights.

The Athlete Agreement has undergone a substantial facelift since its inauguration in 1984 as a result of the commercialization of high performance sport, and the commodification of high performance athletes. The commercialization of high performance sport is evidenced by the increase in Olympic sponsorship revenue from US\$95 million in 1988, to \$550 million in 2000 (Fenton, 2001), to \$2 billion in 2012 (The Guardian, 2012). Slack and Amis (2004) identified that a key component in the sport marketing mix that led to the vast increase in sponsorship revenue was the sponsorship of individual athletes. The realized financial benefits of commodifying athletes led to Canadian NSOs implementing numerous commercial clauses in their Athlete Agreements, insofar as Findlay and Ward (2006) suggested that Athlete Agreements seem to have “morph[ed] into full-fledged commercial contracts” (para. 5). Typically these commercial clauses require athletes to assign (fully or in part) their image rights to their respective NSOs, who in turn proceed to use the athletes' image for their own commercial benefit (Findlay & Ward, 2006).

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In Canada, image rights are defined within its broader classification; personality rights. Personality rights are an individual's "exclusive right to market his or her image or likeness for personal gain" (Corbett et al., 2008, p. 157). 'Image' refers to an individual's photographs used for commercial purposes, while 'likeness' refers to an individual's reputation with the general public. However for the purpose of this study, a more inclusive definition of image rights, as provided by Cloete (2005), is used. Cloete (2005) defined image rights as "the ability of an individual to exclusively control the commercial use of his name, physical/pictorial image, reputation, identity, voice, personality, signature, initials, or nickname in advertisements, marketing and all other forms of media" (p. 14). Moreover, Cloete (2005) identified that the image rights may only be transferred to another party if the individual voluntarily consents to doing so.

The transfer of image rights between athletes and their respective sport governing bodies has become more prevalent in the past decade as such rights have become an increasingly valuable commercial asset (Bosse, 2008). As a valuable asset, conflict over the ownership of image rights has led to disputes among some Canadian athletes and their NSOs. Several athletes have argued that NSOs are impinging on their ability to earn a living from their image by restricting their freedom to engage in media and sponsorship contracts. Among those athletes are former Canadian Olympic figure skaters Shae-Lynn Bourne and Victor Kraatz; Canadian 5-time Olympic champion rower Marnie McBean; and 3-time Olympic swimmer Joanne Malar (Buffery, 1998; Kari, 2000).

Bourne and Kraatz voiced their dissatisfaction with the Athlete Agreement offered to them by the Canadian Figure Skating Association. They publicly announced that they would not sign their Athlete Agreement because it unjustly restricted their

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ability to market themselves. By choosing not to sign the Athlete Agreement they were effectively forfeiting their chance to compete in the Olympic Games (Buffery, 1998). The same year, Marnie McBean also threatened to not sign her Athlete Agreement with Rowing Canada unless they reduced the constraints on her commercial opportunities. In McBean's case, she and the rest of the Canadian rowers were traditionally permitted to sell only an allocated space on their oars for personal endorsements; however, the new agreement that was being proposed at the time even took that opportunity away from them (Buffery, 1998). Joanne Malar and her agent, Nathalie Cook, argued that the commercial constraints in her Athlete Agreement with Swimming Canada made it extremely difficult to attract corporate sponsors leading up to the 2000 Sydney Games. They maintained that potential sponsors were reluctant to sponsor swimmers as the constraints in the swimmers' Athlete Agreements forbade the athletes from publicizing their individual sponsors at international competitions. Malar argued that it was unfair for high performance athletes to be forced to hand-over the control of their image rights to NSOs (Kari, 2000).

The issue over the control of athletes' image rights via the Athlete Agreement has also been identified in recent literature. Findlay and Ward (2006) identified the Athlete Agreement as the main vehicle being used by NSOs to control high performance athletes' image rights. They argued that athletes are waiving much of their commercial opportunities to their respective NSOs by signing their Athlete Agreement. Some Athlete Agreements require athletes to cede their image rights to their respective NSOs, while other Athlete Agreements place detailed restrictions on athletes' freedom to exploit their image without the consent of their NSOs (Corbett et al., 2008). Cloete (2005) argued that

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athletes who are able to properly protect their image rights typically earn substantial profits from the commercial use of their image. However, as is demonstrated further, due to the contractual position of high performance athletes, protecting their image rights is a difficult task.

Protecting high performance athletes' image rights. In Canada, the main protection available to protect one's image rights is the common law tort of misappropriation of personality (Corbett et al., 2008). This tort was established in *Krouse v. Chrysler Canada Ltd.*, wherein the court identified that if a person, group, or organization uses an individual's personality, by way of image or likeness, for commercial gain without the consent of the individual, the aggrieved party may seek recourse through the common law tort of misappropriation of personality. If proven, the court may order damages to the exploited party and/or restrain the accused party from further use of the individual's image or likeness. Athletes can invoke this tort to protect them from unsolicited organizations,¹² however, the athlete is considered to have signed the Athlete Agreement voluntarily, and thus the tort of misappropriation of personality does not apply to constraints imposed by the agreement. Nonetheless, such constraints must still be reasonable. If they are not, they could be subject to the common law doctrine of restraint of trade (Findlay, 1998).

¹² See also *Athans v. Can. Adventure Camps Ltd.* (1977); Canadian Olympic gold medallist Myriam Bédard— biathlon athlete - was able to force a major corporation to remove her image from one of its advertisements by confronting them with evidence that the ad would be considered a misappropriation of her personality (Corbett et al., 2008).

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According to Buti (1999), contractual constraints that limit athletes' freedom to exploit their skills and abilities for commercial gain can bring to bear the common law doctrine of restraint of trade. This doctrine exists to protect persons from all constraints, contractual or non-contractual, voluntary or involuntary, that affect people's ability to earn a living (Buti, 1999). If a restraint is found to be unreasonable, the restraint is illegal (Findlay, 1998). Since *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd.*,¹³ the general approach adopted by courts dealing with restraint of trade issues, is that a restraint of trade is illegal unless it is: "(1) reasonably necessary to protect the interests of the persons in whose favour it is imposed; (2) not unreasonable as regards to the person restrained; and (3) not unreasonably injurious to the public" (Buti, 1999, p. 751). The onus of proof in such cases rests with the party defending the restriction (Buti, 1999; Findlay, 1998).

This doctrine has been invoked in several lawsuits involving high performance sport, such as those that focused on: doping, membership limitations, and transfers within and between leagues (Findlay, 1998). However, there has yet to be a hearing in Canada requiring the courts to evaluate whether the commercial constraints in the Athlete Agreement constitute a restraint of trade. Therefore, it is unclear whether this doctrine could be effectively used to provide recourse to high performance athletes whose commercial rights were being exploited.

Another doctrine that has yet to be tried to protect high performance athletes' commercial rights is the previously discussed¹⁴ doctrine of unconscionability. This

¹³ [1894] A.C. 535

¹⁴ See pages 21-23 for a full discussion of the doctrine of unconscionability.

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doctrine enables the courts to rescind a contract or certain clauses if they are deemed unconscionable (Fridman, 2006). For the courts to rescind the Athlete Agreement and/or strike out the commercial obligations, the athletes would have to demonstrate that when they signed the Athlete Agreement they were a vulnerable party, and that their NSO used its enhanced bargaining power to take advantage of their vulnerable position.

In the absence of any concrete form of legal protection for athletes' image rights, multiple scholars (Corbett et al., 2008; Findlay & Ward, 2006) suggested, "negotiating leverage" as a means for athletes to protect their image rights. Corbett et al. (2008) argued that prominent athletes (i.e., former Olympic medallists and/or upcoming Olympic favourites) may be able to leverage their status to modify the commercial constraints imposed on them through their Athlete Agreement. However, Corbett et al., (2008) further suspected that only a select few Canadian athletes have the necessary prominent status coupled with the legal representation to successfully negotiate a more favourable Athlete Agreement. According to Ekos (2005), in 2004, only 16% of all Canadian high performance athletes were represented by a legal counsel and/or sport agent. Furthermore, unlike the player contracts of professional athletes, which are regulated through collective bargaining and individual negotiations, the Athlete Agreements of high performance athletes are typically dictated by leaders of the NSOs, who are free to restrict the athletes' rights to the extent that they feel is necessary (Mitten & Davis, 2008).

In professional sport, there are a number of mechanisms in place to protect athletes from commercial exploitation. The following section explores the commercial

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protections available to professional athletes to further demonstrate the unique position that high performance athletes face in terms of protecting their image rights.

Legal protections available to professional athletes. Professional athletes are restricted by standard commercial clauses in their contracts with their governing bodies, but unlike high performance athletes, professional athletes' image rights are protected by specific laws and regulations (Garvey, 1979). Professional athletes rely on federal labour and American antitrust laws (in Canada, competition laws) to regulate the contractual relationship. This mix of contract, labour, and antitrust laws provide professional athletes with a considerable amount of protection from both personal and commercial constraints in their playing contracts (Mitten & Davis, 2008). The extent and application of these protections varies between team sport athletes and individual sport athletes. Team sport athletes are considered by law to be employees of their respective teams and leagues. Moreover, most team sport athletes are unionized employees. As members of labour unions, these athletes are protected by federal labour laws, which encourage collective bargaining between professional leagues and their respective athletes. Furthermore, sport agents and legal counsels are typically involved in negotiating individual player contracts (Mitten & Davis, 2008; Weston, 2009). In contrast, individual sport athletes are not considered employees but rather independent contractors. As independent contractors, individual sport athletes rely on their perceived value and competition in the marketplace to negotiate favourable contracts that enable them to exploit their image rights (Mitten & Davis, 2008).

Commercial protections for team sport athletes. The protection from commercial exploitation that team sport athletes enjoy today has been credited to the unionization of professional team sports that became prominent in the late 1960s and early 1970s (Gallant & Staudohar, 2003; Garvey, 1979). According to Beamish and Borowy (1988), prior to the unionization of professional team sports, professional athletes were in much the same position that high performance athletes ostensibly were in 1988 and according to Peel (2010) the high performance athletes position continues to be the same today; having little to no bargaining power over where they could play, what they would be paid, and what benefits they were to be afforded. However, once the National Labour Relations Board certified major league baseball players' union in 1966, United States federal labour laws began protecting athletes' rights by controlling the contracting process (Gallant & Staudohar, 2003). In professional team sport, there are two fundamental contracts that impact athletes' ability to exploit their image: the Collective Bargaining Agreement (CBA), and the Standard Player Contract (SPC).

The CBA governs the legal relationship between the professional athlete and the professional sport franchise. Each of the four major professional sport leagues (National Football League (NFL), National Hockey League (NHL), National Basketball Association (NBA), and Major League Baseball (MLB)) in North America have established their own CBA, which "outlines the rights of all the players and teams in the league" (Kirke & Dick, 2000, para. 8.39). One section of each CBA is dedicated to outlining the endorsement, licensing, and sponsorship rights of the athletes.¹⁵ Similar to

¹⁵ CBA of NHL, article 25:Endorsements, Sponsorship, Licensing; CBA of MLB, Schedule A, section 3(b) and (c); CBA of NBA, article XXXVII, section 1-3; CBA of NFL, article LV, section 1-4

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Athlete Agreements, CBAs do restrict athletes' use of their image rights; however, unlike Athlete Agreements, the constraints in CBAs are a product of arm's length bargaining between league representatives and players' associations. As a result of this negotiation, the commercial constraints CBAs impose on their athletes are limited. The commercial constraints negotiated in the CBA are recognized in each player's SPC as non-negotiable provisions; however, CBAs do allow for certain commercial terms to be negotiated between athletes and teams within the SPC (Kirke & Dick, 2000).

SPCs are the contracts that bind individual athletes to their respective teams. SPCs are comprised of a mix of non-negotiable and negotiable terms. Non-negotiable terms, such as players' obligations, the arbitration process, and endorsement restrictions, are prescribed in the CBA and must be accepted by the players, while negotiable terms such as salary, length of contract, and promotional activities are open for the players to negotiate with their respective teams (Kirke & Dick, 2000). Promotional activities are the only commercial terms that are subject to change from one SPC to the other. Exhibit 1, section 2(d) of the NHL CBA states:

[t]he player agrees...to cooperate with the [team] and participate in any and all of its reasonable promotional activities, which will in the opinion of the [team] promote the welfare of the [team] and to cooperate in the promotion of the league and professional hockey generally. (p. 245)

Thus, each team has the authority to dictate the promotional activities of its players as outlined in the SPC. This contract bears some resemblance to the Athlete Agreement insofar as both contracts are examples of standard form contracts that restrict athletes' commercial opportunities and are employed in a monopolized sport setting. However,

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they differ in that the SPC can more effectively protect athletes from unreasonable exploitation.

Professional athletes, unlike high performance athletes, are also protected by antitrust legislation as well as statutory and non-statutory labour exemptions (Mitten & Davis, 2008). According to Yu (1999), the protection provided by “antitrust laws and labour laws are in constant conflict” (p. 161). Federal antitrust laws are intended to protect consumers (i.e., athletes) from all contracts that unreasonably restrain trade and preclude companies from trade practices. The purpose of antitrust laws is to promote free competition. In contrast, labour laws are intended to restrict free competition by promoting unionization and collective bargaining.¹⁶ According to Yu (1999), this apparent conflict was resolved by the implementation of a statutory and a non-statutory labour exemption, which exempts unions and specific union-employer relationships from antitrust scrutiny. In sport, this enabled sport governing bodies to operate as monopolies and contract athletes rights, as long as the contracts were collectively bargained for between the league and the players’ union. Thus, the labour exemptions provide protection for team sport athletes by requiring the leagues to include the athletes in the negotiation of the CBAs.

Where there is no players’ union, or the union is decertified, antitrust legislation provides team sport athletes with further protections. For example, if the players of a league believe their CBA unreasonably restrains their civil liberties and/or commercial rights they can decertify the union, file an antitrust claim, and, if the courts found certain

¹⁶ Unionization is an example of a monopoly of players and collective bargaining involves one monopoly (union) bargaining with another monopoly (the league). It is the antithesis of free bargaining.

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terms in their contract to be an unreasonable restraint of trade, the contract could be found unenforceable (Yu, 1999).

The degree of influence player unions have over the CBA and SPC drafting processes works to protect professional team sport athletes from commercial exploitation. As a result of knowledgeable and experienced negotiators representing the athletes' interests, athletes have reaped the benefits of favourable CBAs that allow athletes to exploit their images for personal gain (Yu, 1999). As for the negotiation of promotional activities in their SPCs, athletes' interests are most often protected by a legal representative in the form of a lawyer or a player agent who makes a living from helping athletes get the most out of their contracts (Kirke & Dick, 2000).

Commercial protections for individual sport athletes. Swimming, athletics, figure skating, golfing, and tennis are examples of individual sports in which professional athletes are typically considered to be independent contractors as they operate outside of a league structure and are able to decide, barring some restrictions, in which competitions they will participate (Rosner & Shropshire, 2004). In order to compete in a professional individual sport circuit/tour, athletes must meet eligibility and performance standards set by their professional sport governing body (Barrett, 1995; Mitten & Davis, 2008). Some examples of professional individual sport governing bodies are the Professional Golfers Association (PGA), the Ladies Professional Golf Association (LPGA), the Association of Tennis Professionals (ATP), the Women's Tennis Association (WTA), and the National Association for Stock Car Auto Racing (NASCAR).

As part of each governing body's eligibility requirements, all athletes must contract with their respective sport governing body to establish membership (Rosner &

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Shropshire, 2004). Many of these membership contracts require the athletes to assign their media rights to their governing bodies. Since these athletes are not employees they do not have a formal union to bargain a collective agreement on their behalf, however, certain individual sports, such as tennis and golf, do have players' associations that lobby on behalf of the athletes. These players' associations are not a formal party to the contractual relationship between event organizers and athletes but they do strongly influence the content of their contracts in favour of the athletes (Wong, 1994). Using the PGA Tour membership contract as an example, athletes are required to waive only their rights to appear on other "live or recorded television golf programs" (Daniel II, 1997, p. 308), otherwise they are able to freely exploit their own image rights.

There is a second contract individual sport athletes typically enter into that can restrict their ability to exploit their image rights; that being the event participation contract (Mitten & Davis, 2008; Wong, 1994). These contracts are unilaterally drafted and offered up by the event organizers, typically specifying a predetermined non-negotiable prize value based on the performance of the athlete (Rosner & Shropshire, 2004). In other words, the event organizers present the athletes with a 'take-it-or-leave-it' contract that does not necessarily guarantee the athlete any money. Unlike professional team sports and Canadian high performance sports, however, event organizers in individual sports do not have monopoly control over the individual athletes. Rather, they are competing with many other event organizers for athletes' services. As a result of this competition, there exist economic incentives for the event organizers to offer athletes equitable contracts (Mitten & Davis, 2008). According to Rosner and Shropshire (2004), one of the most significant revenue streams for event organizers is gate receipts. The sale

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of gate receipts is largely dependent on attracting marquee athletes to compete in an event. Since individual sport athletes rely heavily on endorsement contracts¹⁷ to provide a steady income to finance their training, travel, and living expenses, events that limit their ability to showcase their sponsors are less attractive choices. Thus, all individual athletes benefit from the marquee status of a select few athletes, as event organizers are reluctant to risk having those athletes pass over their event because of commercial restrictions (Rosner & Shropshire, 2004).

Summing up the legal protections. Professional team sport athletes enjoy considerable freedom to exploit their image rights as a result of representation by certified sports agents in individual negotiations, powerful player unions that greatly influence the content of CBAs and SPCs, and antitrust legislation that prevents sport governing bodies from unreasonable restraint of athletes' trade outside of the CBA (Wong, 2004). As independent contractors, individual sport athletes do not enjoy the same protections as team sport athletes; however, they are able to maintain significant control of their image rights as a result of competition among event organizers, their own level of leverage and influential players associations (Barrett, 1995).

Unlike professional athletes, high performance athletes do not enjoy any of the aforementioned protections. Canadian high performance athletes do not have an established players' union bargaining on their behalf, rather they have an elected athlete

¹⁷ Endorsement contracts are sponsorship deals in which "a sponsor agrees to pay a fee [and/] or provide products to an athlete in exchange for using the athlete's name or image in its promotions" (Epstein, 2003, p. 39).

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representative¹⁸ who is responsible for reviewing the Athlete Agreement and giving his/her approval to the terms (Sport Canada, 2009a). Ekos Research (2005) identified that less than half of Canada's high performance athletes believe that their athlete representative is instrumental in the development of the Athlete Agreement. Beamish and Borowy (1988) argued that the extent of the athlete representative's influence is actually very minimal and that NSOs dictate the contents of their agreements whether the athlete representatives agree or disagree. High performance athletes also do not receive the antitrust protection of professional team sport athletes. The Competition Act, the Canadian equivalent to the antitrust legislation of the United States, is designed to promote competition and efficiency in the Canadian marketplace, however, the Competition Act explicitly exempts amateur sport, allowing monopolized sport governing bodies to exist free of anti-competitive scrutiny (*Competition Act*, s. 6). Thus, unlike professional athletes who are guaranteed the opportunity to bargain for their rights, as prescribed by external legislation, the high performance athletes continue to be subjected to the confines of contract law.

The protection professional individual sport athletes enjoy by leveraging marquee athletes to event organizers is also non-existent in high performance sport. Unlike the event organizers who draft their standard participation contracts to accommodate the marquee athletes, NSOs typically draft their Athlete Agreements to accommodate the average athlete, and some allow the marquee athletes to modify their contracts if necessary (Masteralexis, Barr, & Hums, 2008).

¹⁸ The elected athlete representative is typically a retired athlete with little to no bargaining skills or actual leverage over the NSO.

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Several researchers have identified the lack of legal protection that high performance athletes are afforded in comparison to professional athletes (Beamish & Borowy, 1988; Kidd & Eberts, 1982; Mitten & Davis, 2008). Among these researchers Beamish and Borowy (1988) and Kidd and Eberts (1982) have explored the possibility of high performance athletes receiving legal protections by establishing themselves as either independent contractors or employees.

Upon assessing high performance athletes' contractual relationships, Beamish and Borowy (1988) concluded it would be very unlikely for the courts to categorize these athletes as independent contractors. They argued that, based on the degree of control NSOs possess over the athletes (due to their monopoly over each sport), and the guaranteed monthly stipend the athletes receive through the AAP, the courts would be more apt to categorize high performance athletes as employees than as independent contractors. Conrad (2006) and Rosner and Shropshire (2004) furthered this argument stating that, unlike professional individual sport athletes (i.e., independent contractors) who are responsible for their own training, travel, and living expenses, high performance athletes depend on their NSO to cover the majority of those expenses. Moreover, high performance athletes essentially do not pick and choose which events in which they would like to compete. They are directed by their NSO as to what events they must compete in and how well they must perform in order to have the opportunity to compete at the highest level (e.g., Olympic Games, World Cups).

If high performance athletes could establish themselves as employees they could enjoy certain legal protections from the constraints imposed on them by their NSOs (Beamish & Borowy, 1988). The following section explores the debate on whether high

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performance athletes satisfy the criteria of employee. Since the literature on high performance athletes is very limited, this section focuses on non-professional athletes, including high performance athletes and National Collegiate Athletic Association (NCAA) athletes as potential employees.

Are non-professional athletes employees? Could non-professional athletes be considered employees? Several researchers argued that they should be considered employees (Beamish & Borrowy, 1987; McCormick & McCormick, 2006; Sack & Staurovsky, 1998; Zimbalist, 1999). Case law (e.g., *Everson v. BCF*, and *Rensing v. Indiana State University*¹⁹), and researchers such as Kidd and Eberts (1982), take the position that non-professional athletes are not employees. The impetus behind researchers' arguments that non-professional athletes should be considered employees is to allow access to the legal protections afforded to employees (Beamish, 1993; Beamish & Borowy, 1988; Kidd & Eberts, 1982).

It is fair to say, in most cases, the typical employer has an enhanced bargaining position over its employees. It is for this reason the Canadian government enacted specific legislation to protect employees from employers exploiting, and even abusing, their enhanced bargaining position at the expense of employees (HRSDC, 2009). Two categories of statutory protections are available to employees: employment standards legislation and labour relations legislation. In Canada, each province/territory is responsible for drafting its own employment standards and labour relations legislation; however, the general protections afforded by both pieces of legislation vary little across

¹⁹ [1983] 444 N.E. 2d. 1170

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the provinces and territories. Employment standards legislation guarantees all employees minimum working standards including: hours of work, guaranteed minimum wages, and termination of employment (HRSDC, 2009a). Kidd and Eberts (1982), Beamish and Borowy (1988), and Beamish (1993) argued that, if athletes were treated as employees, employment standards legislation would provide them with these benefits among others, including privacy rights. Although these are important protections, they do not provide athletes with any substantial protections from the exploitation of their commercial rights; the subject matter of this study.

Unlike employment standards legislation, labour relations legislation could potentially protect athletes' commercial rights since labour relations legislation mandates that all employees may exercise their freedom to unionize, and collectively negotiate an employment agreement with their employer (HRSDC, 2009a). Kidd and Eberts (1982), Beamish and Borowy (1988), and Beamish (1993) argued such protection would greatly enhance the Canadian high performance athletes' bargaining position in negotiating terms of their Athlete Agreement, including those relating to commercial opportunities. Moreover, athletes would have the opportunity to form players' unions, similar to those established in professional sports, and negotiate collective bargaining agreements with NSOs. It is well documented that the formation of players' unions and use of collective agreements in professional sport exponentially increased commercial opportunities, among other rights and protections of professional athletes (Dabscheck, 1996; Garvey, 1979; Hadley, 2007; Kidd & Eberts, 1982). However, before any employment or labour protections can be afforded to high performance athletes, they must first be employees.

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Defining an employee. According to section 3 of the Canada Labour Code, the term “employee” refers to “any person employed by an employer and includes a dependent contractor and a private constable, but does not include a person who performs management functions or is employed in a confidential capacity in matters relating to industrial relations” (“Department of Justice”, 2009, s. 3(1)). A four-point test is typically applied to determine employment status. This test as a whole is made up of four individual tests: the degree of control an employer has over the worker (the ‘control’ test); the extent to which the worker owns his or her tools (the ‘entrepreneurial’ test); the worker’s degree of profit or risk of loss (the ‘financial risk’ test), and the degree to which the worker’s task is an integral part of the organization’s day-to-day business (the ‘integration test’). These four tests, taken together, help answer the pivotal question: is the person who has engaged him or herself to perform services, performing them as a person in business on his or her own account?” If the answer to that question is “yes,” then the worker is an independent contractor. If the answer is “no” then the worker is an employee (*Market Investigations Ltd. v. Minister of Social Security*, [1969] 2 QB 173, pp. 738-739). These tests focus on whether a *worker* is an employee or independent contractor, not whether an *individual* is an employee or independent contractor. Because of this difference, researchers exploring the ‘athletes as employees’ debate typically modify the four-point test to determine whether an individual is an employee or not. The modification typically involves expanding the ‘financial risk’ test to include whether or not the individual receives remuneration for his or her services. According to the ‘financial risk’ test, the less likely the chance of financial profit or loss, the less likely the

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individual will be considered an independent contractor (*Wiebe Door Services Ltd. v. Minister of National Revenue*²⁰).

Applying the employee test to non-professional athletes. Kidd and Eberts (1982) were the first athlete advocates to attempt to apply the test to determine if the athletes could reasonably be considered employees. Upon applying a slightly modified²¹ version of the test, Kidd and Eberts (1982) concluded that it would be very unlikely a court would consider high performance athletes to be employees. Although the Athlete Agreement resembled an employment contract, and the control and integration tests were commensurate of employment status, it was their view that the small amount of funding high performance athletes received through the AAP was not comparable to a wage or regular remuneration typical of an employee.

Several years later, Beamish and Borowy (1988) extended Kidd and Eberts' (1982) argument and again asserted that Canadian high performance athletes are employees. Beamish and Borowy (1988) applied the same modified test as Kidd and Eberts (1982) but argued that the working status of the high performance athletes satisfied all four tests including the 'financial risk' test, which they interpreted to incorporate remuneration for services. They argued that the funding athletes received could be categorized as remuneration for their services, defining such services as adherence to training regimes and performance at designated competitions (Beamish & Borowy, 1988).

²⁰ [1986] 2 C.T.C 200

²¹ This test included the 'control' and 'integration' tests described in the four-point test above, however, instead of applying the "financial risk" and the "entrepreneurial" tests, Kidd and Eberts replaced the application of those tests with a 'remuneration' test (did the individual receive payment or other remuneration).

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The argument that high performance athletes are employees has not been tested in the Canadian courts but it was tested in a British employment tribunal in 2001 in *British Cycling Federation v. Wendy Everson*. This case marked the first time an athlete, as plaintiff, attempted to establish recognition as an employee of her national sport body. In this case, the British Cycling Federation (BCF) successfully argued that the athlete was not an employee of the BCF as she did not satisfy the modified²² version of the four-point test establishing an employment relationship. The decision in this case rested on the fact that the 'control' test demonstrated that BCF did not control Everson to a degree that would satisfy an employment relationship, as it did not regulate all of her activities. The application of the 'integration' test identified that Everson did not perform any work or labour for the BCF, rather the purpose of her training, and commitment to it, was to achieve personal success. Furthermore, the purpose of the contract between Everson and the BCF was to promote cycling in the United Kingdom (UK) and not for the purpose of supplying a service to the BCF. And, finally, the Tribunal held that the funding Everson received from the Lottery Sports Fund was paid to her by UK Sport and not the BCF and thus the 'financial' test demonstrated that the funding Everson received could not be regarded as remuneration for her services to BCF.

The Tribunal proceeded to conclude that as Everson's athlete status did not satisfy any of the requirements necessary to establish an employment relationship, Everson could not be considered an employee of BCF. This ruling established, under UK law, that

²² In this case the four point test was modified as follows: 'control' test remained the same; 'integration' test effectively was the same, however it was divided into two sections that the UK tribunal termed 'provision of services' (i.e., was work performed for another party) and 'dominant purpose' (whether the contract between the parties was for a service or some other purpose); the 'financial' risk test was used to determine whether a wage or remuneration for services existed; and the 'entrepreneurial' test was deemed irrelevant and therefore was not included in the decision.

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high performance athletes cannot be considered as employees, and thus not entitled to protection from employment standards or labour relations legislation (UK Sport, 2009).

As a result of this case, NSOs in the UK now insert a specific clause in their Athlete Agreements that explicitly states that the athletes understand and agree that they are not employees of UK Sport or of their respective NSO (UK Sport, 2009).

Concluding remarks on high performance athletes' lack of legal protection.

The previous two sections explored the enhanced protection from commercial constraints that high performance athletes would enjoy if they were categorized as professional athletes, independent contractors, or employees. This has not been the case to date and, as a result, the only protections available to athletes are through contractual remedies. In other words, they can try to leverage their commercial appeal (if they have any) to negotiate a less restrictive use of their commercial rights, or, they can challenge the validity of their Athlete Agreement arguing either a restraint of trade, or that the commercial restraints are unconscionable.

The following section briefly explores Athlete Agreements administered in the United States' (US) and United Kingdom's (UK) high performance sport systems.

Comparing Athlete Agreements. A common thread among Athlete Agreements is that all high performance athletes, regardless of their nationality, must abide by the rules and regulations of the Olympic Charter. Apart from IOC restrictions on the use of "Olympic Properties" for commercial or advertising purposes, there are no other limitations on the rights of National Olympic Committees (NOCs) to exploit their assets for commercial gain outside Olympic competition. It is thus left to the discretion of each

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NOC and its affiliate NSOs to determine the commercial marketing of their properties - including the commercial constraints on their athletes. This section explores the US and UK Athlete Agreements, focusing on how NSOs of each country manage their athletes' image rights. The section concludes with a comparison of the methods used by Canadian NSOs to manage their athletes' image rights through the Athlete Agreement.

US Athlete Agreement. The United States Olympic Committee (USOC) is the governing body responsible for the operation of high performance sport in the US. As the governing body, the USOC is responsible for selecting NSOs to govern each national sport, and specifying certain policies that each NSO must follow in drafting its Athlete Agreement (Wong, 1994). Unique to the US Athlete Agreement are policies prohibiting NSOs from imposing any commercial clauses on their athletes. Section C part 2, of the USOC's policies states: "[NSO's] may not condition participation in any protected competition²³ upon an Athlete's signing of an agreement containing commercial terms." Moreover, the commercial terms are identified in Section C part 4 stating:

Commercial terms mean any provision, whether oral or written:

- a) requiring an Athlete to grant the use of his or her image, picture, likeness, voice, name or biographical information for the purpose of trade;

²³ "Protected Competition" means: (1) any amateur athletic competition between any athlete or athletes officially designated by the appropriate [national governing body] NGB or [Paralympic Sports Organization] PSO as representing the United States, either individually or as part of a team, and any athlete or athletes representing any foreign country where (i) the terms of such competition require that the entrants be teams or individuals representing their respective nations and (ii) the athlete or group of athletes representing the United States are organized and sponsored by the appropriate NGB or PSO in accordance with a defined selection or tryout procedure that is open to all and publicly announced in advance, except for domestic amateur athletic competition, which, by its terms, requires that entrants be expressly restricted to members of a specific class of amateur athletes such as those referred to in Section 220526(a) of the Act; and 2) any domestic amateur athletic competition or event organized and conducted by an NGB or PSO in its selection procedure and publicly announced in advance as a competition or event directly qualifying each successful competitor as an athlete representing the United States in a protected competition as defined in (1) above (USOC Bylaws Section 1.3).

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- b) requiring an Athlete to attend functions other than official team practice or team meetings related to competition events;
- c) requiring an Athlete to give any right of first refusal to an NGB sponsor;
- d) requiring an Athlete to reveal the terms of a personal sponsor contract;
- e) requiring an Athlete to cover up a manufacturer logo on Specialized Equipment, as long as it complies with the relevant IOC, IPC [(International Paralympic Committee)] or PASO [(Pan-American Sports Organization)] rules regarding size and placement;
- f) requiring an Athlete to put a sponsor name, logo or ad on Specialized Equipment;
- g) denying the Athlete the right to choose Specialized Equipment;
- h) requiring an Athlete to relinquish legal rights (except arbitration clauses, tort releases, and medical or insurance-related releases or assignments)

These provisions enable US athletes to control the commercial use of their images and require NSOs to negotiate with the athletes for the use of those rights. Some athletes will choose to maintain control over their image rights, while many others choose to waive some, if not all, of their image rights to their NSO by negotiating a commercial agreement with the NSO (USOC, 2009a). Such a commercial agreement is completely separate from the Athlete Agreement and has no bearing on an athlete's right to participate in the sport (Wong, 1994). Inasmuch as many athletes may not have the knowledge to negotiate their own commercial agreements, or the financial support to afford legal representation to negotiate on their behalf, the USOC, through the Ted

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Stevens Olympic and Amateur Sports Act,²⁴ created an athletes' ombudsperson position to support athletes. The function of the athletes' ombudsperson is to provide independent advice to high performance athletes, assist them in mediating disputes, and consistently work to develop and implement USOC policies that are in the athletes' best interest, all at no financial cost to the athletes (USOC, 2009a). Although the negotiable terms of these commercial agreements are often limited for the average US high performance athlete, professional advice and legal representation from agents, and the ombudsperson, does often enhance the ability of athletes to negotiate more favourable contracts (USOC, 2009).

UK Athlete Agreement. UK Sport operates as the governing body of high performance sport in the United Kingdom. It is responsible for selecting NSOs to oversee the operations of each national sport, and for providing those NSOs with funding to manage and operate their respective sports and promote and foster the development of high performance athletes (UK Sport, 2009). UK Sport requires its NSOs to have an Athlete Agreement and administer it to all of their athletes as a precondition to them participating on the national team (UK Sport, 2009a). These Athlete Agreements are unilaterally developed by each NSO and are imposed on the athletes on a take-it-or-leave-it basis. The Athlete Agreements typically contain commercial constraints requiring UK athletes to assign the use of their image rights to UK Sport, their respective NSO, and their NSO's commercial partners (UK Sport, 2009a, part 6.26). As well, UK Sport requires all UK high performance athletes to agree not to wear or support in any way the

²⁴ Ted Stevens Olympic and Amateur Sports Act is a United States law (codified at 36 U.S.C. Sec. 220501 et seq. of the United States Code) that charters and grants monopoly status to the United States Olympic Committee, and specifies requirements for its member national governing bodies for individual sports.

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products and services of any competitor of the NSO's commercial partners without prior written approval from the NSO (UKSport, 2009a).

Summary. The previous brief review of both UK and US Athlete Agreements reveals that the constraints imposed on high performance athletes by way of Athlete Agreement is not specific to Canada. UK and to some degree US athletes are also restricted. However, unlike Canadian and UK athletes, the US athletes can decide whether they will allow their NSO to restrict their image rights and, if so, to what extent. The multiple contract model used by the United States, which separates the commercial contract from the participation agreement, presents an interesting alternative to the single contract used in Canada and the UK. Not only does the multiple contract model ensure that athletes have authority over the use of their image, it may also reconcile certain contractual issues such as voluntary contract acceptance and freedom to contract.

Chapter 3: Research Design

The purpose of this study was to explore how the inherent power imbalance in high performance sport influenced the bargaining process and resulting commercial rights and obligations set out in NSO1's 2009/2010 Athlete Agreement. This purpose and the selection of research method, determined that the research would be rooted in a socio-legal analysis of the Athlete Agreement negotiation and drafting processes. A qualitative case study design, guided by an understanding of the modern contract perspective (Fridman, 2006) facilitated the evaluation of this phenomenon. The chapter begins by discussing the theoretical framework of this study, and then proceeds to outline the research method, and methods of data collection and data analysis. The chapter concludes by addressing issues of validity and reliability, and ethical concerns.

Theoretical Framework

A theoretical framework can be interpreted as an “empirical theory of social and/or psychological processes, at a variety of levels (e.g., grand, mid-range, and explanatory), that can be applied to the understanding of phenomena” (Anfara & Mertz, 2006, p. xxvii). Theoretical frameworks are drawn from the multitude of disciplines in the social and natural sciences including economics, political science, biology, anthropology, psychology, and sociology to name a few. Diligent researchers must be aware of this multitude of disciplines in order to effectively select the appropriate theoretical framework to allow them to uncover the desired aspects of a given phenomenon (Anfara & Mertz, 2006). As the focus of this research involved exploring the social interactions of a specific group (parties involved in the negotiation and drafting of the Athlete Agreement) and the meanings which that group associated with the

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formation of its social reality (the Athlete Agreement), the appropriate theoretical framework for this study derived from the sociological discipline (Trevino, 2008).

Sociological research can be generalized as “a way of looking at all things social” (Trevino, 2008, p. 1). This broad definition is indicative of the widespread application and use of sociological research to explore given phenomena in a variety of subfields. In current sociological research the most predominant subfields are: the sociology of education, the sociology of race and ethnic relations, political sociology, and of significant importance to this study, the sociology of law (otherwise known as socio-legal research) (Trevino, 2008).

Traditional legal research involves a focus on how to read and understand statutes, regulations, and cases in a practical and diverse manner; however, socio-legal research requires the researcher to treat the law as a social phenomenon and attempt to uncover the social meanings of law and social relations reflected by the process of law-making and enforcement (Cheng, 2004). Socio-legal researchers study the interplay between law and social relationships from either a ‘macro’ or a ‘micro’ level perspective. The study at the ‘macro’ level tends to be conducted by socio-legal researchers from the positivist tradition. These researchers take a holistic view of society and are interested in the integrative function that law has on society as a whole (Trevino, 2008). In contrast, an interpretive socio-legal researcher studies the interplay between law and social relationships at the ‘micro’ level meaning the focus of the research is more concerned with the effects of legal order on the relationships of specific groups of people (Trevino, 2008). This study falls under the micro level perspective as it is concerned with exploring how the structural power imbalance, which is purportedly created and governed through

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contract and contract law respectively, influences the bargaining process of the commercial rights and obligations of the selected NSO's Athlete Agreement.

Research orientation. At both the macro and micro levels of socio-legal inquiry, researchers' ontological and epistemological assumptions influence how they examine a particular social phenomenon. An ontological assumption refers to what a researcher believes is real (Willis, 2007), while an epistemological assumption refers to how a researcher makes sense of the world or, in other words, how he or she justifies his or her beliefs (Ellingson, 2009). These assumptions determine a researcher's orientation, or lens, through which he or she views the world.

According to Willis (2007), there are three distinct research orientations that provide a lens through which a sociological researcher views the world: postpositivism, interpretivism, and critical theory.²⁵ This study is influenced by the ontological and epistemological assumptions associated with critical theory, which are, respectively, that the nature of reality is a product of power imbalances between competing groups, and that such power imbalances are understood through interpretive observation (Willis, 2007). Thus, when conducting socio-legal research through a critical lens, the development and implementation of laws and regulations is seen as a "struggle between competing groups striving to enact and enforce laws favourable to themselves" (Cheng, 2004, p. 54). Critical research begins by identifying a power imbalance within competing groups, such that one party's needs are unable to be satisfied based on the current

²⁵ For an in-depth analyses of each research orientation refer to: Willis, J. W. (2007). *Foundations of qualitative research: interpretive and critical approaches*. Thousand Oaks, CA: Sage.

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relationship between the two parties (Willis, 2009). The competing groups in this study are the Canadian high performance athletes and their respective NSO, while the power imbalance that establishes the purpose of this study is the suggested inequality of bargaining power wherein the NSO is deemed to possess most, if not all, of the bargaining power over determining the content included in the Athlete Agreement. As a result of this purported bargaining power imbalance athletes' needs (in terms of their commercial opportunities) are most likely unsatisfied.

As demonstrated in the paragraphs that follow the critical orientation of this study influenced all components of the research design, including the selection of the research method and the specific data collection strategies that were used to explore and explain how the previously identified power imbalance in high performance sport influences the commercial contents of Athlete Agreements.

Case Study Method

The case study is one of the most commonly used forms of social science research (Willis, 2007), and is readily applied in both qualitative and quantitative studies (Yin, 2009). As this study is strictly qualitative in nature, the case study approach is discussed in its qualitative research context. According to Merriam (2009), "qualitative case studies share with other forms of qualitative research the search for meaning and understanding, the researcher as the primary instrument of data collection and analysis, an inductive investigative strategy, and the end product being richly descriptive" (p. 39). The case study differs from other qualitative research methods in that it provides an unrivalled analysis of a bounded system, such as a person, group, program, community, or

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organization (Merriam, 1998). It is also most useful in creating "context-based knowledge and experience" (Flyvbjerg, 2006, p. 222).

It is widely accepted that the purpose of case study research is to describe and analyze a particular phenomena in a bounded system (Merriam, 1998; Stake, 1995; Yin, 2005). However, the nature and appropriate usage of case study research is marked with uncertainty that stems from its lack of a congruent definition (Merriam, 1998). On the one hand, Yin (2009) defines a case study as “an empirical inquiry that investigates a contemporary phenomenon in-depth and within its real-life context, especially when the boundaries between the phenomenon and context are not clearly evident” (p. 15). This definition emphasizes that the focus of case study research is on the process of carrying out the investigation. Stake (1995), on the other hand, emphasizes that the focus of case study research be on the unit of analysis (i.e., the case), suggesting that the methodological process is not as important as identifying the unit of analysis and the boundaries that make up the bounded system to be studied (Merriam, 1998).

Upon exploring a breadth of recent literature around the application of the case study method (Andrews, Mason & Silk, 2005; Forneris & Peden-McAlpine, 2009; Levy, 1988; Ly Thi, 2008; McDonnell et al, 2000; McGloin, 2008; Merriam, 2009; Partington, 2002; Tellis, 1997; and Torrance, 2005), it would appear that neither Yin’s (2008) nor Stake’s (1995) definitions and respective approaches to developing a case study design has emerged as the predominant approach. Rather, as Merriam (2009) explained, “each of [their] approaches reveals something about case studies and contributes to a general understanding of the nature of this kind of research” (p. 40). Yin’s definition contributes to the understanding of when case study research is warranted; that is, when it is

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“impossible to separate the phenomenon’s variables from their context” (Merriam, 1998, p. 29). Stake’s definition contributes to the importance of “delimiting the object of study, the case” (Merriam, 2009, p. 40).

Although a combination of both Yin and Stake’s definitions provides a flexible approach to developing a case study design, Merriam’s (2009) approach to further characterize a case study as particularistic, descriptive, and heuristic, more clearly justified the case study approach as the appropriate research method for this study. According to Merriam (2009), “particularistic” means that each case focuses on a specific phenomenon; “descriptive” means that, following careful analysis of each case, rich description of the phenomenon is uncovered; and, “heuristic” means that the process enhances the understanding of the phenomenon such that new meaning or confirmation of previous knowledge is established (Merriam, 1998). This approach appears to be the most suitable for this study insomuch as this study evidently possesses the particularistic, descriptive, and heuristic features used to define a case study. The case in this study is particularistic in that it is only focused on the negotiation and drafting process of a single NSO’s Athlete Agreement. The case is descriptive in that it provided rich a description of the drafting and negotiation process via in-depth interviews with individuals representing each of the groups influencing its contents recounting their knowledge and involvement in the processes. Finally, the case is heuristic in that the influence of the structural power imbalance in high performance sport on the bargaining process of a single NSO’s Athlete Agreement was uncovered through analysis of the experiences of the research participants.

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When applying a case study approach, the researcher has many responsibilities including: identification of the phenomenon (i.e., unit of analysis) and the bounded system (a case), selection of the research questions to guide the inquiry, carrying out in-depth data collection, triangulating key observations for interpretation, and reporting a case description and case-based themes (Creswell, 2007; Stake, 2005). In conducting this study, the aforementioned responsibilities were followed, and a single case was used to explore the phenomenon. In this study, the phenomenon was the impact of the inherent power imbalance in high performance sport on the negotiation and drafting of the commercial contents of the Athlete Agreement. The bounded context for this study was NSO1's 2009/2010 Athlete Agreement.

Selecting the case. According to Stake (1995), the ability to gather meaningful data in a case study is largely dependent on how well a case is chosen. The suitability of a case is measured by its capacity to represent the overall topic of interest. As previously discussed, the topic of interest in this study is how the power dynamic in high performance sport influences the drafting and negotiation of an athlete's commercial opportunities. In order to provide an information rich exploration of this topic it was necessary that the case selected encompassed an NSO and high performance athletes who have commercial appeal and therefore value the process of deciding on the commercial constraints in the Athlete Agreement. To achieve this, the case was purposefully sampled to properly represent the aforementioned characteristics.

Case selection criteria. Purposeful sampling was used to select a single NSO, from the pool of 60 NSOs recognized by Sport Canada at the time of this study (SportCan, 2009b). Purposeful case sampling involves establishing selection criteria to

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limit all the possible cases to the one that can provide the most information rich data (Patton, 1990). There are multiple forms of purposeful sampling; however, critical case sampling was selected as the ideal sampling method. According to Patton (1990) the specific phenomena being studied are most likely to appear in critical cases. To identify critical cases, Patton (1990) suggested asking which site suits the statement “if it doesn’t happen there, it won’t happen anywhere” (p. 174). In this study the “it” referred to commercial constraints limiting athletes’ freedom to exploit their image for commercial gain. The following four factors were used as the selection criteria to identify the critical case:

1. The NSO must represent an individual sport
2. The NSO must be recognized as highly commercial.
3. The NSO must have athletes who have recently demonstrated success in international competition, and
4. Of the NSOs that meet the above criteria, the final determining factor is the NSO that presents the least barriers to access in terms of accessing the full range of interviewee categories.

Criterion 1: The NSO must represent an individual sport. The pool of potential cases was limited to NSOs representing individual sports. NSOs representing team sport were excluded from this study for the following two reasons. First and foremost, this study took the position that there is a significant difference between the bargaining positions of a team sport athlete in comparison to an individual sport athlete. Individual sport athletes can only be evaluated on their personal performances, and they must therefore rely predominantly on their individual successes to raise their commercial

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profile. In contrast, team sport athletes' success is the product of a group initiative. Individual performance is less tangible, and a team sport athlete's commercial profile could arguably rise or fall with the team's success regardless of each individual's actual contribution. Secondly, the review of literature identified that the majority of disputes concerning Athlete Agreements were made by individual sport athletes (Kari, 2000; "Skaters Resolve", 1988; Stubbs, 1993; Dimanno, 2013). Therefore, limiting the pool of NSOs to those representing individual athletes was consistent with the critical case selection method, which requires narrowing the focus to a site where the phenomenon under study is more likely to appear.

Criterion 2: The NSO must be recognized as highly commercial. This criterion was an important limiting factor as the focus of the study revolved around the commercial content of the Athlete Agreement. Thus, the greater the commercial status (i.e., commercial appeal) an NSO possessed, the greater likelihood of potential controversy over the commercial content, therein provoking more meaningful and rich data. The commercial status of the NSOs was evaluated by borrowing from research conducted by Séguin, Teed, and O'Reilly (2005) and Berrett and Slack (2001) who both assessed the commercial appeal of Canada's NSOs in relation to the amount of sponsorship dollars each raised. However, because the majority of NSOs did not make their financial statements available to the public, obtaining sponsorship revenues for each NSO was beyond the reach of this study. Therefore, as a result this study relied on an alternate method to classify an NSO's level of commercial appeal. This method involved two steps: totalling the NSOs number of commercial sponsors, and looking at their overall participation levels in the sport. The former category was deemed relevant based

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on the premise that the more sponsors an NSO had, the greater the likelihood that its athletes could be further restrained in terms of who they can lobby for individual sponsorships. The latter category was identified by Berrett and Slack (2001) as a strong indication of commercial potential.

Using these two variables the NSOs representing individual sports were classified first by number of commercial sponsors, and secondly by participation rates. An NSO's number of commercial sponsors was publicly accessible on its website. The participation rates were drawn from the Canadian Heritage resources database (Canadian Heritage, 2010).

Criterion 3: The NSO must have athletes who have demonstrated success in international competition. This criterion was important to ensure that the NSO had athletes with commercial appeal to potential sponsors. This factor was based on the findings of Séguin et al., (2005) that success in international competition is a main factor in attracting corporate sponsorship. Thus, NSOs that satisfied the first factor would then be further categorized by their athletes' success in international competition. A list of top 5 finishes at the past Olympic Games and World Cup were used to evaluate "demonstrated success."

Criterion 4: the NSO that presents the least barriers to access in terms of accessing the full range of interviewee categories. This criterion involved obtaining suggestions from key informants regarding which NSO presents the least barriers to access the full range of interviewee categories (identified below). Patton (1990) suggested that a clue to identifying a critical case is to ask a key informant about the suitability of a potential case. In this study, the key informants were members of the

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Thesis Committee who have extensive knowledge of NSOs and many contacts in the industry to provide pertinent information regarding the suitability of an NSO for this study.

By applying the preceding criteria, a list of 6 critical cases materialized. As critical cases, each of the remaining NSOs were considered to be appropriate sites to gather meaningful data on the power dynamics in the drafting and negotiation of the commercial contents of their respective Athlete Agreements. Nonetheless, these NSOs were prioritized based on their number of sponsors. The NSO with the most sponsors was contacted first. After initially agreeing to participate in the study, this NSO, hereinafter referred to as NSOx, later withdrew (reasons for its withdrawal are discussed on p. 63). Given time restraints brought on by NSOx²⁶ withdrawing, the NSOs with the second and third most sponsors respectively were contacted the same day and informed that the first NSO agreeing to participate amongst them would be selected. As a result, the NSO with the third most number of sponsors was selected. The selected NSO shall hereinafter be referred to as “NSO1.”

NSO1. The purpose of this section is to contextualize the site of analysis without disclosing such information that would reveal the identity of NSO1. The anonymity of NSO1 was deemed necessary to protect the interests of the interview participants and the NSO as an organization. Nonetheless, the following information encompasses the status of NSO1 as it was during the data collection period (September-December 2010).

²⁶ “NSOx” refers to the initial NSO approached to participate in this study who eventually decided not to participate following an interview with the CEO.

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NSO1 was determined to be an appropriate site to examine the bargaining power dynamic between the organization and its athletes because it represented an individual sport, it was comparatively classified as highly commercial, its athletes demonstrated success in international competition in the previous year and, it was highly recommended by members of the Thesis Committee as an interesting site.

This study classified NSO1 among the top six most commercially viable individual sport NSOs in Canada. NSO1 was classified as such as a result of its high number of commercial sponsors and its extremely high participation rates. NSO1 ranked among the top 5 individual sports in number of corporate sponsors (as determined by counting the number of sponsors recognized on the NSOs' respective "sponsor recognition page" of their websites).²⁷ Furthermore, NSO1's participation rate (i.e., the number of individuals participating in this sport at any level) was among the top 5 percent of all Canadian NSOs (individual and team sport) (Canadian Heritage, 2010). Moreover, it carried more nationally carded athletes than the majority of individual sport NSOs.

NSO1 also fostered multiple athletes who achieved success in international competition leading up to the 2009-2010 Athlete Agreement carding period. This success included an Olympic medal in 2008, numerous top three finishes at the 2009 World Championships, and a 2009 nominee for Canadian Athlete of the Year.²⁸ Finally, NSO1 was recommended by one of this study's key informants as an interesting site to conduct this study. This recommendation was based on the recent hiring of a CEO who, based on

²⁷ These statistics are in reference to the number of corporate sponsors each individual sport NSO had listed on their website as of June 2010

²⁸ To protect the anonymity of NSO1 the gender of the nominee was not disclosed.

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his experience in the industry working with the athletes, was expected to be interested in improving the relationships between NSO1 and its athletes. Upon contacting NSO1 and conducting an introductory interview with NSO1's CEO wherein the proposed research process was disclosed, the CEO expressed significant interest in the study and immediately facilitated the beginning of the data collection process by providing NSO1's 2009-2010 Athlete Agreement and the contact information for the athletes and NSO1 representatives.

Although NSO1 was the site used to conduct this study; NSOx was the first selected and initially agreed to participate in this study; however, following an introductory interview, NSOx's CEO decided not to participate. This introductory interview was significant because during it the CEO confirmed that NSOx negotiated less commercially restraining Athlete Agreements with some of their most successful athletes. However, this information was not common knowledge among NSOx's athletes and, as a result, the CEO felt it was not in the best interests of the organization to participate in the study. He was concerned with how his athletes would react if they found out that some of their teammates were given the opportunity to negotiate a more commercially favourable Athlete Agreement than others.

Data Collection Methods

When conducting case study research, there is not one particular data collection method that is more advantageous than others, rather, multiple sources of data collection can result in methods complementing one another and enhancing the overall reliability of the data collected (Yin, 2008). Therefore, this study chose to incorporate two main data collection methods: document analysis, and semi-structured interviews.

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Document analysis. Document analysis is a data collection method that involves gathering topic-specific texts that require interpretation within context (Lincoln & Guba, 1985). This method of generating empirical data is a common way of conducting qualitative research because many organizations and institutions allow easy and low, or no cost, access to the use of their documents for research purposes. Furthermore, documented information can provide a historical insight that may not be attainable through other methods such as participant observation or interviews (Lincoln & Guba, 1985). According to Hodder (1994), document analysis “provides a ‘truer’ indication of original meanings than do other types of evidence” (p. 394).

Document review. In this study, data collection began by analyzing the Athlete Agreements developed by the selected NSO. Two documents were analyzed, the 2008/2009 Athlete Agreement and the 2009/2010 Athlete Agreement, in order to understand the progression of the commercial content to further contextualize the study. A copy of each standard Athlete Agreement used over the past 5 years was requested from AthletesCan but they did not have copies of the Agreements. Instead, the 2007/2008 Athlete Agreement was provided directly by the CEO of the selected NSO, who assured the researcher that it was the exact standard form agreement used between 2005 and 2009. The athletes’ individual agreements were not obtained. At the time of proposing this research, it was intended that each participating athlete would be asked to provide a copy of his or her Athlete Agreement and they would be examined prior to the interviews. Ultimately, this was not required as each athlete executed the same basic copy of the 2009/2010 Agreement that the researcher was given. The two Athlete Agreements collected provided hard evidence of the commercial constraints imposed on the athletes,

which, in turn, were used to guide the interview. The comparative analysis of these documents is discussed in the last section of Chapter 4.

Research limited to using only document analysis is often criticized for not triangulating its data with primary sources to provide interpretations of the text (Hodder, 1994). This study avoided such criticism through the use of semi-structured interviews with those parties who were part of the drafting and negotiation process of the Athlete Agreements.

Semi-structured interviews. Qualitative interviews enable researchers to discover unobservable information through verbal communication. Moreover, they are a tool to understanding interviewees' perceptions of certain phenomena and uncover meaning from their experiences (Kvale & Brinkmann, 2009). Merriam (1998) identified three general types of interviews: structured, semi-structured, and unstructured.²⁹ Semi-structured interviews were used in this study because they enabled the researcher to focus on a variety of issues with very few boundaries (Merriam, 2009). For semi-structured interviews, the interview guide is extremely important as it provides a general outline of the topics to be covered and asks general questions to maintain the focus of the interview (Merriam, 1998). Through open-ended questions, the interviews engaged the interviewees in dialogue with the researcher about their feelings and perceptions of the drafting and negotiation processes of the Athlete Agreement and of the outcomes that have ensued as a result. In an effort to generate a comprehensive and complex understanding of individuals' feeling and perceptions throughout the interviews, descriptive, structured, and contrast questions were asked. Descriptive questions, such as

²⁹ For more information on structured and unstructured interviews see Merriam (1998) pages 74-75.

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asking the participants to explain their involvement in developing the commercial rights and obligations, were used to learn about participants' experiences. Structured questions, such as asking participants when they first received a copy of the Athlete Agreement and whether they read it, were used to investigate specific details of these experiences. Finally, contrast questions, such as asking the interview participants to discuss the exchange of image rights between the athletes and NSO and comment on the necessity from both party's perspectives, were used to clarify and check the meaning and interpretation of the participants responses (Yin, 2008).

Selecting interview participants. Purposeful sampling was used to select the interview participants for this study. According to Merriam (2009), purposeful sampling is often used in case study research to effectively narrow the sample within the boundaries of the case to the objects of importance to the study. The objective of this process was to interview the main parties presumed to influence the drafting and negotiation processes of the commercial contents of the selected NSO's Athlete Agreement. In determining who the main parties were this study conducted a preliminary interview with the CEO of the selected NSO. During this preliminary interview the CEO suggested that the athletes, specific NSO representatives, and the Athletes' Council likely influenced the commercial contents of the Athlete Agreement. Furthermore, following the first interview with one of the NSO representatives it was discovered that two athlete agents also influenced the contents. Based on this information the goal was to interview

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six athletes at least one athlete agent, two NSO representatives, and a member of the Athletes' Council.³⁰

Athlete Selection. Based on Findlay and Ward's (2006) suggestion that an athlete's level of commercial appeal was, in part, correlative to his or her ability to negotiate the contents of his or her Athlete Agreement, this study decided that it would gain a more complete picture of the bargaining positions by interviewing athletes with varying degrees of commercial appeal. Although interviewing every athlete in the selected NSO would provide the most accurate representation of the athletes' bargaining positions, this was not feasible given the time and financial constraints limiting the scope of this study. However, according to Ellingson (2009), plurality of perspectives is more important than data saturation and homogeneity. In other words, by sampling a mix of athletes with varying degrees of perceived commercial appeal, and therefore presumably varying degrees of bargaining power, the selected NSOs athletes' bargaining positions could be effectively explored with a limited number of interviews. This sampling mix, based on athletes' level of commercial appeal, was used, and five athletes were selected for interviews. Although there are many variables that influence an athlete's level of commercial appeal, with 60 plus athletes to choose from and limited access to the personal characteristics that might influence their level of commercial appeal, this study relied solely on the proposition of Séguin, Teed, and O'Reilly (2005) that commercial appeal is directly correlated to success in competition. Thus, the world rankings retrieved from the selected NSO's website were used to place the NSO's athletes into one of three

³⁰ High performance athletes are represented within the decision-making committee of their NSO by an athlete representative whom they elect to do so.

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categories of commercial appeal: low (outside of the top 10), medium (outside of the top 3), and high (within the top 3). Athletes could have multiple rankings based on the number of events³¹ in which they competed; however, their top performing event was used to classify them. Initially, two athletes were selected from each group to be interviewed; however, one of the athletes from the medium level of commercial appeal classification, who initially agreed to participate, later chose not to participate and was not replaced due to difficulties making contact with a replacement from the same category coupled with time constraints to complete the data collection process. Among the five athletes interviewed, two were on NSO1's Athletes' Council and shared their opinion as Council members and as athletes. Table 3-1 sets out the relevant demographics of the athletes interviewed.

Table 3-1 Interview Participants: Athletes

Interview Participant	Birth Year	Compete for NSO1	Athletes' Council	Agent	2009 Finishes*	2008 Olympic Games	World Rank	Commercial Appeal Rank
Athlete#1	1982	1998- Present	YES	NO	11 th , 19 th , 44 th	7 th	41	Bottom
Athlete#2	1984	2001-present	NO	NO	27 th , 32 nd , 44 th	12 th	37	Bottom
Athlete#3	1987	2006-present	NO	NO	9 th , 12 th , 13 th	7 th (CR)	17	Middle
Athlete#4	1988	2006-present	NO	YES	2 nd , 3 rd , 15 th	3 rd (OR)	2	Top
Athlete#5	1983	2001-2012	YES	NO	1 st , 2 nd , 4 th	6 th (CR)	1	Top

*Finishes in World Championship and/or Olympic Games qualifying events (all international competitions).

CR- Canadian Record

OR –Olympic Record in the semi-finals

World Rank – 2008/2009 season world ranking for each athlete's best event.

In addition to the five athlete interviews, two NSO representatives and one athlete agent were also interviewed. The two NSO representatives were selected following the

³¹ An "event" is different from a "competition". For the purpose of this study "competition" refers to the games (Olympic Games, World Cup, Pan American Games etc.), whereas "event" refers to the individual events (i.e., 100m sprint, high jump, 50m breaststroke etc.).

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initial discussion with NSO1's CEO. According to the CEO, these two NSO representatives were the most involved and most knowledgeable about the drafting and negotiation of the commercial content of the Athlete Agreement. These NSO representatives were the first two parties to be interviewed. During the first interview, NSO Representative#1 identified that two athlete agents were involved in the negotiation of the commercial contents of the Athlete Agreement. One of the agents represented Athlete#4. Thus, upon inviting Athlete#4 to participate in this study,³² the opportunity to speak with his agent, hereinafter referred to as Agent#1, was requested and approved. Table 3-2 and Table 3-3 set out the relevant demographics of the NSO representatives and Agent#1 respectively.

Table 3-2 Interview Participants: NSO Representatives

Interview Participant	Position with NSO1	Information from NSO1's CEO
NSO Representative#1	Legal consultant	<ul style="list-style-type: none">- Experience drafting Athlete Agreements- Most knowledgeable in NSO1 of commercial rights- Responsible for making the final changes
NSO Representative#2	Chief Operating Officer	<ul style="list-style-type: none">- Responsible for administering NSO1's Athlete Agreements- Oversees drafting and negotiation processes- NSO1 employee for 5 years

Table 3-3 Interview Participant: Agent

Interview Participant	Position	Information from NSO Representative#1
Agent#1	Athlete#4's Agent	<ul style="list-style-type: none">- Directly involved in the negotiation of the commercial contents of the Athlete Agreement- Represents Athlete#4 as well as other high performance athletes in other sports.- Strong understanding of commercial rights.

³² See Appendix B – Letter of Invitation.

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Interview process. The interviews followed the "seven stages of interview investigation" as outlined by Kvale and Brinkmann (2009, p. 97). The seven stages are: thematizing, designing, interviewing, transcribing, analyzing, verifying, and reporting.

Stage 1: Thematizing. This stage involved answering the questions 'why' and 'what' to define the purpose and the theme of the investigation, respectively. Why? Literature on high performance sport suggested that high performance athletes had little to no influence over the contents of their Athlete Agreement as a result of a significant imbalance of power between athletes and their respective NSOs (Beamish & Borowy, 1988; Kidd & Eberts, 1982; Peel, 2010). Furthermore, given the increasing commercialization of the high performance sport industry the inability of athletes to control the use of their image rights was becoming a more pressing concern (Findlay & Ward, 2006; Peel, 2010). What? The purpose of the interviews was to examine the above suggestions and explore the power dynamic between the athletes and NSO1.

Stage 2: Designing. This stage involved planning the design of the interviews, taking into consideration both the intended knowledge and moral implications of the study. Because the imbalance of bargaining power and the increasing awThe interview questions were developed following the document analysis (current and former Athlete Agreements to which each athlete was or currently is a party) as information gathered from the contracts was used to guide the development of certain interview questions.

Stage 3: Interviewing. This stage was conducted systematically via telephone interviews. Telephone interviews were deemed the most appropriate interviewing method to accommodate both the wide geographical spread of the research participants and their

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collective preference to speak over the phone rather than through video conference software. Each interview was recorded using a digital audio recorder.

In total, nine interviews were conducted; eight from within the case study, and one ‘expert interview’ with a former athlete, and current self-proclaimed athlete advocate, Ann Peel. The ‘expert interview’ preceded the interviews of the eight case study participants. The purpose of the ‘expert interview’ was threefold: to gauge the effectiveness of the probing questions in the interview guide, to prepare the researcher for possible questions that might be asked from the case study participants, and to add some context to the researchers understanding of the relationship between athletes and NSOs prior to the case study interviews. First, this interview verified that the interview guide was effective in facilitating a detailed discussion of the research topic. Second, this interview encouraged me to be prepared to inform the athletes of what their commercial rights are, as the expert, from her experience as an athlete and an athlete advocate, suggested most athletes would require clarification. Third, as a Canadian high performance athlete from 1982 to 1990, and the founding chair of Athletes CAN, this interview enabled me to gain an enhanced understanding of the development of the Athlete Agreement and the increasing importance of the commercial rights and obligations from an athlete’s perspective (results from this interview are briefly explored in Chapter 4).

Following the ‘expert interview’ the interviews with the eight case study participants were conducted. Each interview was audio recorded and followed the same semi-structured interview guide. The duration of the interviews ranged from 40 to 80 minutes.

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Stage 4: Transcribing. This stage involved turning the digital audio recorded interviews into data that could be analyzed. Each interview was digitally recorded and transcribed verbatim immediately following the interview.

Stage 5: Analyzing. This stage was involved organizing the information collected into data points that could be analyzed. Both theory-driven and data-driven analysis techniques were used to facilitate a more detailed understanding of the raw data (Merriam, 2009). Theory-driven codes were developed prior to the interview process (see Appendix D for a complete list of theory-driven codes and their corresponding antecedents). Theories and assumptions presented in Chapter 2 concerning the athletes' bargaining position and/or the nature of the drafting and negotiation process of the Athlete Agreement were used as antecedents to theorize the research participants' perceptions of the negotiation process and to organize the results in a manner to explore the bargaining power dynamics. A code was developed for each antecedent and attached to the data in the interview transcript to which it related. An example of a theory-driven code that was developed for this study is "PImbalance". This code was developed to identify segments of data that supported the theory that an identifiable power imbalance exists between NSOs and athletes (Beamish & Borowy, 1988; Foster, 2003; Kidd & Eberts, 1982). Upon coding the 'expert interview' it was acknowledged that this code ("PImbalance") was too broad. As a result, it was divided into three sub-codes: PImbalanceAA, PImbalanceAD, and PImbalanceCO. These codes represented influences of the power imbalance on the Athlete Agreement as a whole, on the athletes' actions, and on the commercial rights and obligations, respectively. The 48 theory-driven codes

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were used in organizing the data in an effective manner to address the theories and assumptions presented in Chapter 2.

Data-driven codes emerged throughout the analysis of the interview transcripts. An initial list of data-driven codes was created following the analysis of the ‘expert interview’; however, this list expanded throughout the analysis of the interview transcripts and, as a result, some of the transcripts had to be revisited to add data-driven codes that emerged from subsequent transcripts. The data-driven codes were used to capture and organize the emotions of the interview participants towards certain antecedents. An example of a data-driven code that emerged is NSO1”. This code was identified a specific data segment in which the interviewee was expressing negative feelings towards NSO1. Consequently, the code “+NSO” was used to represent data segments in which the interviewee was speaking positively towards the actions of NSO1. (For a complete list of data-driven codes see Appendix D.)

Throughout the coding process the interview transcripts were concurrently analyzed via meaning interpretation. Meaning interpretation is the process of taking statements, or expressions, made by an interviewee and critically interpreting a deeper, latent meaning (Kvale & Brinkmann, 2009). This data analysis technique is particularly useful when analyzing “extensive and often complex interview texts” (Kvale & Brinkmann, 2009, p. 207). The legal issues and principles that drove this study were complex, and were beyond the understanding of some of the interviewees. However, their responses were effectively analyzed by interpreting the meaning into a legal context.

Once all of the raw data was meaningfully interpreted and coded, the coded data were transferred into an excel spreadsheet keeping the interview transcripts separate from

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one another. The next step involved identifying emergent themes within each interview transcript, producing interview specific themes. These interview specific themes were then examined as a whole and led to the emergence of the research themes. The themes used in this study are those found to influence athletes' bargaining positions. Three such themes emerged: a lack of understanding of their commercial rights, a lack of legal representation, and no legitimate alternative to signing the Athlete Agreement.

Stage 6: Verifying. This stage of the interview process involved assessing the interviews to test the validity and reliability of the findings. Validity, in its qualitative form, refers to the accuracy of the interview findings. As described by Kvale and Brinkmann (2009), it “pertains to the degree that a method investigates what it intended to investigate” (p. 246). There are many strategies a researcher can use to enhance the validity of a research interview as long as the issue of validity is addressed at the onset of the research process (Morse, Barrett, Mayan, Olson, & Spiers, 2002). One strategy suggested by Morse et al. (2002) is the application of the principle of methodological coherence. This principle maintains that a study enhances its validity when it can be demonstrated that the selected methodology matches the research question. According to Yin (2003), a single case study methodology is most suitable for exploring a critical theory. In this study the selected case proved to be a more than suitable site to explore the influence of the structural power imbalance on the negotiation of the commercial contents of the Athlete Agreement. The analysis of this imbalance of power and the identification of the relational tensions between the athletes and NSO1 that also contributed to the athletes' inequitable bargaining position manifested as a result of the critical lens that guided this study.

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Reflexivity is another form of qualitative validation that can effectively enhance a study's validity (King & Horrocks, 2010). Reflexivity requires the researcher to be cognizant of his or her influence on the data collected and makes visible their part in the knowledge created from those data (Steier, 1991). This was accomplished by documenting my observations and thoughts in a narrative journal throughout the entire data collection and analysis process. These journal entries served as a valuable audit trail of important findings, emergent themes, and the development of early theories (Willis, 2007).

Reliability refers to the consistency and trustworthiness of the data collected (Kvale & Brinkmann, 2009). In an effort to make this study reliable, two strategies were employed: member checking and external auditing (Willis, 2007). Member checking is the process of revisiting the interviewees and asking for their approval of the accuracy of the interview transcript (Willis, 2007). Participants were offered the opportunity to review their interview transcripts. The transcribed interviews were emailed to each research participant within three weeks of their respective interviews. Each research participant was encouraged to offer any feedback he or she felt necessary on their transcript; however, none of the participants chose to do so, thus purportedly accepting the factual content of the transcripts.

External auditing refers to the process of acquiring feedback from a research professional not involved in the data collection process. For a master's thesis, external auditing is accomplished by the researcher effectively using his or her Thesis Committee to review the proposed practices. Concerns and suggestions of the external auditor(s)

regarding the research process were addressed by this Thesis Committee during the proposal defence, which preceded the researcher entering the field.

Stage 7: Reporting. This stage of Kvale and Brinkmann's (2009) interviewing model, involves reporting the research findings through a detailed presentation of results that takes into consideration the ethical aspects of the investigation. The main ethical issues to be considered in interview research are typically participants' right to privacy, their informed consent, and confidentiality (Kvale & Brinkmann, 2009). The first ethical issue that confronted this study was contacting the participants. In order to approach the participants in a professional and ethical manner, the selected NSO was contacted and upon their acceptance to take part in the study they provided the researcher with the contact information for all members, including athletes, of the selected sport organization. Upon receiving their contact information, a consent form and a letter of invitation outlining the purpose and focus of the study was sent to each participant.³³ The second ethical issue that this study encountered was ensuring that each participant voluntarily consented to participate in the study. This issue was resolved by having each participant confirm via email that they had an opportunity to read and understand the consent form, and that they agreed to participate pursuant to it. Furthermore, the consent form was revisited with the interviewee at the onset of the interview wherein the participant was asked to verbally consent to understanding and participating in the study.

³³ Both the Letter of invitation and consent form were approved by the Brock University Research Ethics Board.

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Confidentiality in the research process was established by using pseudonyms for each interview participant and ensuring that data identifying the participant remained undisclosed (Kvale & Brinkmann, 2009).

Chapter 4: Findings and Discussion

Foster (2003) argued that the power imbalance in high performance sport is so one sided in favour of the NSO that the relationship between an athlete and an NSO should not be contractual. Notwithstanding this view, the legal relationship between Canadian high performance athletes and their respective NSOs continues to be governed by contract. This study suggests that the apparent acceptance of the Athlete Agreement, despite concerns of bargaining power disparity, can be attributed to the relationship between these parties being generally understood from a traditional contract law perspective. This perspective is not concerned with inequalities of bargaining power, rather it emphasizes the individual's autonomy to enter into agreements and be legally bound by their terms. In acknowledging the ongoing legal shift away from the traditional contract law perspective, this study examines the Athlete Agreement from the modern contract law perspective, which emphasizes the influence of bargaining power on contractual relationships.

From a modern contract law perspective, the legal concern arising from an imbalance of power between contracting parties is that the contract could be found unconscionable, and therefore of no force and effect. The purpose of this chapter is not to determine whether the Athlete Agreement is unconscionable, but rather to use the framework of the doctrine of unconscionability to examine NSO1's 2009-2010 Athlete Agreement and how its commercial content was influenced. This framework is made up of two tests (Fridman, 2006):

1. Is there a power imbalance between the contracting parties?
2. Was that power imbalance used to extract an unfair contract?

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The first test was answered in Chapter 2 where it became clear that all high performance athletes face a structural power imbalance wherein the NSO's monopoly position gives it power over the athletes' opportunity to compete in international competition.

The second test involves exploring whether the stronger party used the power imbalance, to extract a grossly unfair agreement from the weaker party (Murray, 2011). This chapter focuses on this second test of unconscionability and examines how the structural power imbalance influenced NSO1's position in the drafting and negotiation of the commercial contents of the Athlete Agreement, if at all.

This chapter is organized by the study's research questions. The first research question explores the relative bargaining positions of NSO1 and the athletes in drafting and negotiating the commercial contents of the Athlete Agreement. The purpose of this question is to identify the process used in drafting the commercial contents of NSO1's 2009/2010 Athlete Agreement, and the involvement of various parties in the process. The second research question explores each party's perception of the negotiation process, and evaluates the substance of the Athlete Agreement relative to the commercial rights and obligations.

RQ1: How are the Commercial Rights and Obligations within the Athlete Agreement Decided?

A prevalent theme originating from the literature is the understanding that a structural power imbalance exists between athletes and NSOs enabling the NSO to unilaterally draft the Athlete Agreement (Foster 2003). This structural power imbalance is created by the monopoly that NSOs possess over the nomination of athletes to compete

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in internationally sanctioned sport competitions (such as the Olympic Games). As a result of this power imbalance, it was suggested that athletes have little to no influence over the contents of the Athlete Agreement (Foster, 2003; Peel, 2010). This lack of influence has progressively become more important as the Athlete Agreement has become more controlling over the livelihood of individual athletes.

What was formerly seen as a document used to formalize the funding provided to athletes through Sport Canada's Athlete Assistance Program, has now developed into a "full fledged commercial contract" (Findlay & Ward, 2006, para. 5) that often requires athletes to waive some, if not all, of their commercial rights. As identified in Chapter 2, unlike the case for the commercial rights of professional athletes, a mandated collective bargaining process does not protect high performance athletes' commercial rights, nor are they protected by employment standards legislation. Instead, they are subject to the protections of contract law, and dependent on the ability of athletes to negotiate a favourable contract (i.e., an Athlete Agreement) that protects their commercial rights

This research question is divided into two sub-questions. The first question explores each party's involvement in the initial drafting and negotiation of the commercial contents of the Athlete Agreement. The second question examines how an athlete's level of commercial appeal influences his or her bargaining position with NSO1.

RQ 1(a): To what extent is each party involved in the initial drafting and negotiation processes of the Athlete Agreement? The data support a fundamental concern presented in the literature that, as a monopoly, NSOs have the power to

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unilaterally dictate the content of the Athlete Agreement (Mitten, 2009). Each interview participant, including the two NSO representatives, confirmed that NSO1 had the power, and used it, to unilaterally develop the initial draft of the Athlete Agreement. NSO Representative#1 described the method NSO1 used to draft the Athlete Agreement, stating, “the Agreement is [drafted] by NSO1, on the basis of good practices, of current trends, on the basis of, you know, Sport Canada requirements and other comparable models. But basically NSO1 takes the lead and develops it.” Athletes, Athletes’ Council members, and athlete agents were all excluded from the development of the initial draft of the Athlete Agreement. According to NSO1 representatives, the intention was to circulate this first draft to all the parties in order to receive feedback before finalizing the Agreement. NSO Representative#1 claimed that the athletes and Athletes’ Council members were invited by email, and through conference calls, to provide feedback on the content of the upcoming Athlete Agreement but neither party took advantage of these opportunities. However, NSO Representative#2 acknowledged that the NSO was partially to blame for the lack of involvement by the athletes and Athletes’ Council members, admitting that the negotiation process took place during a particularly inopportune time for both. “I think that when we give them a document to read when they are training at their ultimate level, it is probably foolish on our part to expect that they would actually do that [i.e., review it]” stated NSO Representative#2.

The athletes, in complete contrast to the NSO Representatives’ description of the opportunity to provide feedback, claim that they do not recall receiving a copy of the initial draft of the agreement or being invited to take part in the negotiation process. As

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well, it was Agent#1's understanding that the initial draft of the Athlete Agreement was circulated only to him³⁴ and one other agent, not to the athletes. This finding demonstrates that there was a disconnect between NSO1 and the athletes leading up to the initial drafting and negotiation processes, which may contributed to the athletes' lack of involvement in both processes.

Agent#1 and one other agent³⁵ did receive the initial draft, and were involved in discussing the commercial contents of the Athlete Agreement with NSO1. However, according to both Agent#1 and NSO Representative#1, each party understood that their discussions of the commercial contents took the form of a 'consultation' process rather than a 'negotiation' process,³⁶ as NSO1 maintained complete control over what content would be included in the Athlete Agreement. As NSO Representative#1 explained, "the approach [NSO1] took was more of a consultative process, where an initial draft was developed and, as I said, athletes or their [agents] were then invited to contribute, to bring their comments on various drafts." In commenting on his involvement and acknowledgement of NSO1's authority, Agent#1 stated, "I sent my feedback to [NSO1] but I think they had a legal counsel and another marketing person who were evaluating it. A lot of the things [that] I said should be in there, weren't, not that I expected everything to be." In commenting on the involvement of the agents in the negotiation process, NSO Representative#1 indicated that "we [had] back and forth discussions with a couple of

³⁴ To further protect the identities of the interview participants, male pronouns and possessive adjectives will be used for each interviewee.

³⁵ This individual was a colleague of Agent#1, and according to Agent#1, he represented another one of NSO1's top athletes, who like Athlete#4 was also an Olympic medallist.

³⁶ A negotiation process requires each party acknowledging the necessity to arrive at a collective agreement, whereas a consultation by definition does not require an agreement rather just a forum for each party to express their interests where one party reserves the right to make the final decision (Fowler, 1998).

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agents and we made changes.” NSO Representative#2 added “from [the agents’] feedback we made some changes and, quite honestly, [we] probably gave a little bit more rights to the athletes based on those communications.” A document review of NSO1’s past and present Athlete Agreements confirms this. For example, new to the most recent Athlete Agreement (2009/2010), is a clause requiring NSO1’s sponsors, or licensees who use an athlete’s commercial attributes by having them appear at an event, to compensate the athletes with mutually agreed upon fees and the timing of such appearances must be mutually decided.³⁷ In the former Athlete Agreement (2008-2009), athletes were not compensated and had no influence over when they were required to make an appearance for one of NSO1’s sponsors or licensees.

Athletes#2 and #3 were unaware that NSO1 included agents in the negotiation process and were therefore unable to comment on the agents’ influence on the commercial content of the Athlete Agreement. Athletes #1, #4, and #5 were aware of the agents’ involvement and did comment on how the agents influenced the commercial content. Athletes #1 and #5 suggested the agents had a strong influence. However, Athlete#4 was not so convinced that the agents elicited much influence at all.

In speaking to Agent#1’s level of influence, Athlete#1 stated:

Well I’d say they would have no influence on anything other than the commercial obligations of it [i.e., the Athlete Agreement], within that, I’d say a pretty big influence where it is obvious there were things ignored on the [athletes’] side of it

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[speaking to the previous Athlete Agreement], so it was good to have the agents' input on how to protect our rights in the most efficient manner possible.

Consistent with Athlete#1's perception, Athlete#5 also suggested the agents, more specifically Agent#1, elicited a strong influence during the negotiation process.

According to him:

Well, I know [Athlete#4], he has an agent [Agent#1], and when his agent was looking through the agreement he was like "this is ridiculous", saying, "they can't do that, they can't have that," and as a result, changes were made in our favour. So I think a lot of it had to do with his [Athlete#4's] agent,

In contrast to Athletes #1 and #5, Athlete#4 stated:

I think they [the agents] have a say but I don't know how much influence they have. I mean it's all up to how much the lawyer [i.e., NSO Representative#1] and how much NSO1 wants to listen to them. I mean, I appreciated the change over the last couple of years but I don't think it's nearly enough, so it's [the agents' influence] probably pretty low.

Regardless of the degree of influence of the agents, it is evident the Athlete Agreement became somewhat less commercially restrictive because of their involvement. Further, based on the athletes' comments, without their involvement, those changes likely would not have occurred.

To summarize, the athletes and Athletes' Council members had no direct involvement in the drafting and negotiation processes. NSO1 unilaterally developed the initial draft of the Athlete Agreement and only the two agents representing NSO1 athletes were involved in the negotiation process. In analyzing the involvement of the parties and

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their understanding of how the initial drafting and negotiation processes worked, it is evident that the parties implicitly recognized the influence of the structural power imbalance. Specifically, the comments from Agent#1 and NSO Representative#2, which acknowledge NSO1's power to dictate the terms of the Athlete Agreement, speak to their understanding of the monopoly NSO1 possesses. Nonetheless, the fact that the agents were still able to influence the contents suggests that the agents did have some degree of influence (i.e., bargaining power).

Nonetheless, the structural power imbalance may not completely control the outcome of the Athlete Agreement: other factors may influence the parties' bargaining positions. In building on this proposition, the following research question explores the theory proffered by Findlay and Ward (2006) that an athlete's level of commercial appeal may influence the commercial contents of his or her Athlete Agreement. In the analysis that follows, multiple factors, some unrelated to the structural power imbalance, including commercial appeal, are identified as contributing to the athletes' inequitable bargaining position.

RQ 1(b): What effect, if any, does the commercial appeal of an athlete have on the commercial constraints in his or her Athlete Agreement? Prior to the interview process, the purpose of this research question was to determine if certain athletes in NSO1 were subjected to greater or lesser commercial restraint as a result of their level of commercial appeal. However, this purpose expanded throughout the interview process to also explore how an athlete's level of commercial appeal influenced his or her bargaining position.

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This research question was influenced by Findlay and Ward's (2006) suggestion that some NSOs negotiate individual Athlete Agreements with their top performing athletes, while others offer a standard Athlete Agreement to all of their athletes. Throughout the interviews, it became apparent that one standard Athlete Agreement was administered to all NSO1 athletes, suggesting that an athlete's level of commercial appeal did not affect the Athlete Agreement. However, although all of the athletes were subjected to the same commercial terms, the most successful athlete, of those interviewed, was able to negotiate a more flexible application of those terms. In other words, the top performing athlete, among the interviewees, was able to exert sufficient influence over NSO1 to receive more favourable treatment, while the rest of the athletes interviewed could not. In exploring why certain athletes were able to establish bargaining power and others were not, three factors emerged from the data: legal representation, knowledge of commercial rights, and meaningful alternative to signing the Athlete Agreement. The analysis of these factors explores how each is shaped by the athletes' level of commercial appeal. Among the athletes in this study Athletes#1 and #2 are nearing retirement, Athlete#3 is relatively new to the high performance sport system and on the upswing of his career, Athlete#4 is the top performing athlete in NSO1, and Athlete#5 is one of the top performing athletes but is on the downswing of his high performance career.

The following table sets out the commercial profiles of the athletes interviewed for this study.

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Table 4-1 Athlete Profiles

Interview Participant	Birth Year	Agent	2009 Finishes*	2008 Olympic Games	World Rank	Commercial Appeal
Athlete#1	1982	NO	11 th , 19 th , 44 th	7 th	41	Low
Athlete#2	1984	NO	27 th , 32 nd , 44 th	12 th	37	Low
Athlete#3	1987	NO	9 th , 12 th , 13 th	7 th (CR)	9	Moderate
Athlete#4	1988	YES	2 nd , 3 rd , 15 th	3 rd (OR)	2	High
Athlete#5	1983	NO	1 st , 2 nd , 4 th	6 th (CR)	3	High

*Finishes in World Championship and/or Olympic Games qualifying events (all international competitions).

CR- set a Canadian Record

OR – set an Olympic Record in the semi-finals

World Rank – 2008/2009 season world ranking for each athlete's best event.

The majority of athletes are in a weak bargaining position in comparison to NSOI. Three factors emerged as major elements influencing the bargaining position of a majority of the athletes with the NSO: lack of access to legal representation, lack of knowledge of the commercial rights, and no legitimate alternative to signing the Athlete Agreement.

Lack of access to legal representation. The first theme that emerged from the data as a contributing factor to the athletes' inequitable bargaining position was the influence of a lack of legal representation. Multiple authors (Corbett et al., 2008; Findlay & Ward, 2006; Peel, 2010) suggest that successful athletes with legal representation may be able to negotiate a more favourable application of the commercial rights set out in their Athlete Agreement. These sources argue that athletes who are successful in their sport become more commercially valuable and may be able to leverage their commercial value to create bargaining power to negotiate with their NSO. Agents, or other legal professionals, are then able to use that negotiating leverage to help the athlete exploit his or her commercial value for financial gain. However, as the findings from this study demonstrate, the majority of athletes, despite competitive successes, cannot attract an

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agent, lack bargaining power, and consequently appear to struggle to obtain commercial sponsorships.

According to the athletes interviewed, they had only two options to obtain (legal) representation: hire a lawyer or try to get representation by a sport agent. All of the athletes interviewed stated they did not have the financial means to hire a lawyer, and only Athlete#4 was represented by an agent.

According to NSO Representative#2, only three of their 60-plus high performance athletes were represented by an agent and, from Agent#1's understanding, only the three athletes who were represented had an individual commercial sponsor. This number is consistent with Findlay and Ward (2006), suggesting less than 10% of athletes are commercially viable. This finding would suggest that, for approximately 90% of the athletes who sign the Athlete Agreement, the fact that they are required to transfer use of their commercial rights to the NSO should not be of any practical concern. However, this is not the case. In this study, the situation was that, with the exception of the Elite athlete (i.e., Athlete#4), the importance of the commercial content and the desire to influence it, greatly varies among athletes depending upon what stage they are at in their career.

Athletes#1 and #2 were not concerned with finding an agent because they believed they were not commercially viable as athletes. Both athletes were nearing the end of their competitive careers with NSO1, entering their 12th and 10th years respectively. These athletes acknowledged that at this point in their career they had very little commercial value.

Athlete#3 was entering only his 5th year with NSO1 and felt his commercial value was growing as his performances continued to improve in international competition.

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However, he claimed he did not bother trying to find an agent because he knew of other more successful athletes in NSO1 who could not attract an agent. As a result of not having an agent, he felt he missed out on capitalizing commercially on his competitive successes, particularly as he had previously been approached by a commercial sponsor but had not been able to close the deal (which will be further explored later in this chapter at page 94).

Athlete#5 actively sought to acquire representation but no agent or agency would represent him, even though he was the top Canadian athlete in his discipline,³⁸ and had medalled at multiple international events (though not the Olympic Games). Similar to Athlete#3, Athlete#5 felt he missed out on commercial opportunities because, although he was competitively successful, he felt he did not have the knowledge or the confidence to solicit sponsors or deal with NSO1. In speaking directly to why Athlete#5 could not get an agent, Agent#1 commented:

[Athlete#5] is a fantastic [athlete], performance-wise is there, smart, attractive, everything, but it's from a marketing standpoint it's tough to sell anybody, and the window of time you have to start working on people and putting them forward it can be a year, 2 years long before we finally find somebody [a sponsor] who's interested.

Athlete#4 was the only represented athlete interviewed. He was able to procure personal sponsorships and, unlike Athletes#1, #2, #3, and #5, felt he had complete control of his commercial rights. Prior to the 2009/2010 season, Athlete#4 was endorsed by a

³⁸ Athlete#5 competed in different events than Athlete#4. Both were the top Canadian athletes in their respective events.

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competing sponsor to NSO1. According to both Athlete#4 and his agent, Agent#1, Athlete#4 would have remained with his sponsor, regardless of what NSO1 might have wanted, if NSO1's sponsor had not offered him a more lucrative personal endorsement deal. Agent#1 added that, had they not negotiated the deal they eventually did with NSO1, NSO1 would have been in a difficult legal position because it would not have been able to allow its sponsor to use Athlete#4's image. Although the NSO representatives did not comment on this matter, it is evident that both Athlete#4 and his agent, Agent#1, believed they had negotiating leverage over NSO1.

Unlike Athlete#4, the other athletes in this study felt powerless to challenge or dispute the contents of their Athlete Agreement and, as a result, never questioned NSO1's decisions with regard to their commercial rights. Why would the athletes not question NSO1's use of their rights? Beyond their lack of representation, this study suggests another reason is because although the athletes have a basic understanding of what commercial rights are, they are unsure what commercial rights they have and how they can use them.

Knowledge of their commercial rights. The second theme that emerged as an element influencing the athletes' bargaining position is the athletes' knowledge of their commercial rights. The results of this study found that the majority of athletes do not understand their commercial rights, and are therefore in a weak position to negotiate the use of those rights with NSO1. This situation is indicative of an information asymmetry: a contractual relationship whereby "parties are differently informed, with one party having access to better or more information than the other" (Becher, 2008, p. 733). The concern with the existence of an information asymmetry is that it often results in the

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drafting party taking advantage of the other party (Becher, 2008). To explore whether NSO1 was taking advantage of the athletes' lack of knowledge, both NSO1 and the athletes were asked a number of questions that enabled an evaluation of each party's access to information and level of knowledge concerning the contents of the Athlete Agreement. The results of this line of inquiry revealed that the athletes had little to no knowledge of what the commercial rights and obligations set out in their Athlete Agreement were.

Each athlete identified that certain components of the Athlete Agreement were beyond his understanding. These included difficulties understanding the commercial terminology and legalities of the Athlete Agreement. For example, Athlete#4, who stated that his agent had informed him of his commercial rights, explained that he was still unaware of the consequences of not signing the Athlete Agreement:

If you were not to sign the agreement in, let's say a world championship year, I don't know what really happens; if legally we wouldn't be allowed to [compete] with them, or, you know what I mean? I don't know the legalities of it.

Athlete#1 also commented on the athletes' lack of understanding of the commercial rights and obligations stating that, "a formal negotiation [of the Athlete Agreement] with a great number of [athletes] would probably be impractical in the sense that there aren't that many [athletes] who would be knowledgeable." Why is it that the athletes are not knowledgeable? On the one hand, the athletes believe it is because NSO1 failed to educate them about their commercial rights and to update them on any changes to their Athlete Agreement. On the other hand, NSO1 representatives believe that it is the

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athletes' responsibility to seek out advice in order to interpret the contents of their Athlete Agreement and that they have not done this.

The only education the athletes received about the current content and recent changes to the Athlete Agreement was during the distribution of the Athlete Agreements at a meeting held during a national competition. According to Athlete#1, most of the carded athletes were at the meeting and all those attending received their Athlete Agreement and listened while NSO1's Technical Director³⁹ outlined changes that were made from the previous Athlete Agreement. Although the changes to the athletes' commercial rights and obligations were briefly addressed, the intention of the meeting was not for the Technical Director to educate the athletes on the meaning or implications of such changes. According to Athlete#1, the Technical Director briefly discussed the changes to the Athlete Agreement, which were predominantly about their commercial obligations. "This year, in particular, was the commercial obligations side. He didn't really outline, or go through each point, but he sort of gave the general viewpoint of [NSO1] and why we needed to accept this," commented Athlete#1. Thus, the athletes attending the Technical Director's session were not provided with any real information regarding the operation of the commercial contents of their Athlete Agreement and, according to Athlete#3, the athletes who were unable to attend the session did not receive any information or notification of any changes to the commercial contents of the Athlete Agreement at all. Indeed, when asked whether he was informed of the changes, and educated about his commercial rights, Athlete#3, who did not attend the meeting, replied:

³⁹ According to NSO Representative#2, the Technical Director was very familiar with the contents of the Athlete Agreement and his past experience, which was not elaborated upon, made him more than capable of effectively distributing and explaining the commercial contents of the Athlete Agreement to the athletes.

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No, I mean, I feel like I can say no to that because I didn't even know there were any [changes]. No one even told us they made a change, and I listen in meetings, so I wouldn't have missed that.

Although NSO1 had the opportunity to inform the athletes of their commercial rights, which may have minimized the apparent information gap identified by Athlete#3, according to the Athlete Agreement, this is not the responsibility of NSO1. Section 14 of the Athlete Agreement - *Independent Legal Advice*, reads:

The Athlete is responsible for seeking and obtaining, when necessary, legal advice to understand this Agreement. The Athlete hereby confirms that it has been recommended to the Athlete that the Athlete consult with a legal advisor and obtain independent legal advice prior to the execution of this Agreement. The Athlete confirms to NSO1 that (a) he or she has obtained independent legal advice, or in the alternative, (b) that he or she has voluntarily declined to seek independent legal advice, despite being given every opportunity to do so. The Athlete confirms that he or she has signed this Agreement voluntarily and with full understanding of the nature and consequences of the Agreement.

Upon reading the Athlete Agreement, the athletes should have been fully aware that contractually the Athlete Agreement made it their responsibility, and not NSO1's, to educate themselves about the contents of their Athlete Agreement. However, it appears that the majority of athletes did not read the Athlete Agreement. In all cases, the interviewees perceived that only a select few athletes actually read the Athlete Agreement, and even fewer understand its content. NSO1 representatives commented that one of their biggest hurdles is the athletes' unwillingness to read the Athlete Agreement.

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When asked what sort of issues NSO1 faced in terms of dealing with the Athlete Agreement, NSO Representative#2 responded, “quite honestly, our biggest issue is just trying to get athletes to read the bloody thing!” The athletes confirmed this message, with four of the five athletes indicating that they did not thoroughly read the Athlete Agreement.

By not reading the Athlete Agreement, the athletes widened the information gap that already put them at a disadvantage. Gazal-Ayal (2007) theorized that a monopoly party (e.g., NSO1) will not abuse its power to the detriment of its members (e.g., athletes) when all members read and fully understand the standard form contract. Moreover, in the absence of members reading and understanding the contract, he argued that a monopoly party is most often encouraged to offer sub-optimal terms.⁴⁰ Therefore, in accordance with Gazal-Ayal’s (2007) theory, the fact that the majority of athletes did not read the Athlete Agreement suggests that NSO1 was more likely to unreasonably restrain the athletes’ commercial opportunities. However, as the results in this study demonstrate, the knowledge of one party, Agent#1, had the effect of reducing the influence of the information asymmetry and resulting in a more fair agreement for the athletes. This finding was consistent with Gillette’s (2004) theory which suggested that even if only a few contract recipients read and understand the contents of a standard form contract, the drafting party will actually be influenced by those few adherents, and as a result, will not abuse their power to the detriment of the adhering party. This finding suggests that knowledge of the commercial contents may, to some extent, translate to power in the

⁴⁰ For Gazal-Ayal’s rationalization of why monopolists offer sub-optimal terms see page 121 of Gazal-Ayal, O. (2007). Economic analysis of standard form contracts: the monopoly case. *European Journal of Law and Economics*, 24, 119–136.

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sense that NSO1 will be less inclined to unfairly restrict the athletes if NSO1 believes at least some of the athletes (or their agents) understand the commercial contents of the Athlete Agreement.

Regardless of whether NSO1 should have educated the athletes, or the athletes should have taken the initiative to educate themselves, the athletes were disadvantaged as a result of their lack of knowledge of their commercial rights. For example, Athlete#2 shared his acceptance of the commercial rights set out in the Athlete Agreement stating,

some athletes, I'm an example, don't know the full [commercial] rights of what [sponsors/endorsements] you can go out and get for yourself, especially considering how we get pushed to wear certain things at certain times. So I end up just doing what I'm told.

As another example, Athlete#3 claimed to have had an opportunity to sign a personal endorsement contract with an equipment sponsor but he was unaware whether he was contractually permitted to do so and he felt pressured by NSO1 to decline the offer and continue supporting NSO1's sponsor's equipment:

I feel like one of the things is that they said you can go through with it [sign a contract with a sponsor], but you'll have to do this, this, and this, and we also really wouldn't like it. So, at the same time, I really do not want to make anyone mad at [NSO1]. I feel like the better you are, the more pull you have, you know? I feel like I would have been more confident if I had a world record or a medal from Worlds or an Olympic medal, you know? I could be like, no, give me what I want!

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This opportunity for Athlete#3 appears to have been an anomaly as comments from the other athletes indicate that commercial opportunities are very scarce. Athlete#1 and #2 identified that they were never approached by sponsors nor were they successful in garnering individual sponsorships. Athlete#5 also could not procure individual endorsements, nor was he compensated by NSO1, or its sponsors, for the use of his image. In speaking to this issue during the 2009/2010 carding cycle, Athlete#5 stated:

My name is used a lot [by NSO1], and my likeness, and who I am, and I don't feel that I get anything for that ... There was one time when someone sent me a link saying "oh is this person sponsoring you," because my picture was up on their website in such a way that it looked like I was their personal sponsor[ee]. So, I emailed them asking why they were using this, and the guy wrote back and was like "oh, well, it's not up in a way that we look like your personal sponsor, and I help out with [NSO1], so they said that I could use it." So that was one instance where I wasn't too happy because he was making it look like he was sponsoring me but I wasn't getting anything from him.

This situation exemplifies how the knowledge disparity between represented and unrepresented athletes influences their ability to protect the use of their image and profit from its use. Since Athlete#5 did not understand his commercial rights, he did not know to refer to Section 4.10 of Schedule E: '[NSO1] Member Personal Endorsement and Sponsorship Policy' (hereinafter referred to as 'Sponsorship Schedule') of his Athlete Agreement. The section set out that a licensee or sponsor of NSO1 has the right to use an athlete's image to promote its business as long as it does not imply a testimonial or endorsement of any product, and as long as it compensates the athlete. It appears that in

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this case the athlete was unaware of this change in the most recent Athlete Agreement and as a result he was unable to both protect the unauthorized use of his image and/or profit from its use.

In summary, all of the athletes interviewed identified that they had very little knowledge of what commercial rights they had pursuant to the constraints in their Athlete Agreement, and how those rights could, or could not, be used. Unlike Athlete#4, the other athletes (Athletes#3 and #5) who felt their commercial rights had value, each suggested that their lack of knowledge was a barrier to effectively negotiating the use of their commercial rights with NSO1. Although Athlete#4 expressed he did not have complete knowledge of what his commercial rights were, his lack of knowledge did not influence his ability to negotiate commercial opportunities with NSO1 because Agent#1 represented his interests. In effect, Agent#1 mitigated the information gap that Athlete#4 would have faced. It is important to acknowledge that, unlike Agent#1's involvement in the negotiation process of the Athlete Agreement, which benefited all athletes, his involvement in negotiating sponsorships for Athlete#4 only benefited Athlete#4. Therefore as a result of not having the requisite level of commercial appeal to attract an agent, and their reluctance to educate themselves about their commercial rights, the majority of athletes had little to no bargaining power to negotiate the application of specific commercial elements with NSO1.

No legitimate alternative to signing the Athlete Agreement. The third and final theme that emerged as a contributing factor to an athlete's bargaining position is whether or not the athletes have a legitimate alternative to signing the Athlete Agreement. The results suggested that for the majority of athletes there was no alternative to signing the

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Athlete Agreement. These results were consistent with Beamish and Borowy's (1988) assertion that Athlete Agreements are presented to the athletes on a "take-it-or-leave-it" basis. When NSO1 presented the athletes with the Athlete Agreement, the athletes had two options, accept all of the terms and conditions of the Athlete Agreement, and thereby ensure their eligibility to compete in international competition, or decline and forfeit their eligibility to compete in international competitions. Unlike the U.S. Athlete Agreements, there was no option for the athletes to opt-out of the commercial contents in their Athlete Agreement.

Athletes#1, #2, #3, and #5, explained that it did not matter what they thought about the contents of the Athlete Agreement, or if they even read it, because if they wanted to compete in their sport, they had to sign the Athlete Agreement. "There were parts [of the Athlete Agreement] that I had disagreements with but, you know, I mean I can't not sign it" explained Athlete#2. Athlete#3 also commented on the inability to actually provide voluntary consent stating "well, no one held a gun to my head and forced me to sign, but if you don't sign, there's nothing else you can do." This type of 'forced consent' was questioned by Ferrari (2004) when he challenged whether commercial constraints in Italian Athlete Agreements should be enforceable. Baker III, Grady, and Rappole (2011) made a similar argument with regards to NCAA athletes wherein they argued that it was unreasonable that these athletes had no viable alternative to signing the NCAA agreement, which also required the athletes to waive their commercial rights. Both NSO representatives were aware of the involuntary nature of the consent for the majority of athletes (consent being implied from the execution of the agreement by the

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athletes) and, as a result, were concerned with what might happen if the enforceability of the commercial contents was challenged. For example NSO Representative#1 explained:

Our athletes don't have any option. If they want to go to the Olympics they have to come through us because we are the sanctioning body. There is no other body in Canada. So they have to go through this and, I guess, the day that somebody wanted to really dispute the way that we, dare I say, almost force our athletes to sign this, you know, I don't know how we would deal with it quite honestly.

This type of forced consent is antithetical to the fundamental principles of a contract, which require parties to enter into agreements under their own volition (Mulachy & Tillotson, 2004). According to Bix (2008), the two most telling variables in determining if a contract was entered into voluntarily is whether the agreeing party had knowledge of the terms and freedom from coercion (i.e., reasonable alternatives). The above results demonstrate that the majority of athletes lacked knowledge of their commercial rights, and had no viable alternative to signing the Athlete Agreement. If this is the case, if the athletes did not actually consent, why has the Athlete Agreement not been struck down years ago as an invalid contract? This study suggests one answer could be that despite the power imbalance and the information asymmetry favouring NSO1, if the terms of the contract are fair, consent becomes a non-issue in practice. Another answer to the question could be the fact that certain athletes do consider their acceptance of the Athlete Agreement to be voluntary, and those particular athletes just happen to be the ones who are most influenced by the commercial restraints.

In contrast to the rest of the athletes, Athlete#4 firmly held that he did not feel forced to sign the Athlete Agreement. He was confident that he possessed sufficient

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bargaining power to reject commercial terms of the Athlete Agreement if he did not approve of them, and that NSO1 would alter those terms to persuade him to sign and compete for them. He further stated that, following discussions with his agent, he voluntarily signed the Athlete Agreement intentionally accepting the commercial obligations. In relation to Bix's (2008) definition of consent, Athlete#4 had both knowledge (as a result of his agent's involvement) and a legitimate alternative to signing, which was to hold out and rely on his commercial appeal to force NSO1 to renegotiate.

Nonetheless, Athlete#4 did identify that, in comparison to most of the athletes, his situation was unique because he was the top athlete in his sport and was one of only three NSO1 athletes who had an agent negotiating on his behalf. He further acknowledged that most athletes in NSO1 did not have the bargaining power he had and, for them, signing likely was not a choice rather it was the only option.

Summing up the emergent themes and the influence of commercial appeal on athletes' bargaining power. The preceding results suggest that the importance of the commercial rights and obligations, and the ability of an athlete to influence them, greatly vary among athletes based on the stage they are at in their career, and largely depend on the athletes' ability to understand how they work. With the exception of Athlete#4, none of the athletes were able to negotiate a flexible application of the commercial contents of their Athlete Agreements with NSO1, nor were they in a position to voluntarily consent to the Athlete Agreement. Although Athletes#1 and #2 lacked knowledge of their commercial rights, legal representation, and any real choice not to sign their Athlete Agreements, these factors did not directly influence their bargaining position with NSO1 because they had no interest in negotiating the use of their commercial rights. Both

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athletes acknowledged that they were nearing the end of their careers and as a result of their declining performances, they no longer had much commercial appeal. Therefore, without any apparent commercial appeal, they were not concerned with how their commercial rights were being restrained. Although in theory, their lack of knowledge and any viable alternative suggest Athletes#1 and #2 were not in a position to voluntarily consent to the terms of their agreements, in practice, and specifically with regard to the acceptance of their commercial rights, consent would appear to be a non-issue.

Unlike Athletes#1 and #2, Athletes#3 and #5 were interested in influencing the application of their commercial rights and, lack of consent could present an issue from a contractual perspective. Athletes#3 and #5 did perceive themselves to have some commercial appeal; however their bargaining position was weakened as a result of their lack of knowledge of their commercial rights, their lack of legal representation, and their lack of any real choice not to sign their Athlete Agreement if they wished to compete internationally. Both athletes demonstrated that they had, to varying degrees, some commercial appeal worth protecting. The fact that Athlete #3 was approached by a corporate sponsor, and the fact that Athlete#5's image was used by a third party for commercial purposes, suggested that both athletes had built up some commercial value in their identity. However, this study suggests that their ability to take advantage of their commercial value may have been influenced by a lack of representation and a lack of understanding of their commercial rights. Each of these factors represents influences potentially independent from the effects of the structural power imbalance. However, the third factor, no legitimate alternative to signing the Athlete Agreement, comes as a direct result of the influence of the structural power imbalance in high performance sport.

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Athletes#3 and #5 had no legitimate alternative to accepting NSO1's terms if they wanted to compete for Canada in international competition.

From a contractual perspective, Athletes#3 and #5's lack of knowledge and lack of a legitimate alternative to signing the Athlete Agreement would support an argument that the athletes did not consent to the terms of the Athlete Agreement, and unlike Athletes#1 and #2, this lack of consent does represent an issue.

To conclude, it is evident that a majority of athletes in NSO1 find themselves in a weak bargaining position in comparison to NSO1. Athletes without commercial appeal have no bargaining power and subsequently no real need to enhance their bargaining position because they are not concerned with the use of their commercial rights. Athletes with some commercial appeal, but not sufficient to attract an agent, may be able to enhance their bargaining position by seeking out an alternative form of representation, and/or educating themselves about their commercial rights. However, until these athletes reach a level of performance, and subsequent level of commercial appeal, whereby they are "irreplaceable" to NSO1, they will still find themselves in a weaker bargaining position than NSO1. Finally, athletes with actual commercial appeal, whose athletic performance has essentially made them irreplaceable by the NSO, find themselves in a position where they can exert influence over NSO1 to negotiate favourable, or at least equitable, terms to their commercial rights. It follows that the ability of the agents to influence the commercial content of the Athlete Agreement is directly related to the commercial appeal of their clients, whose athletic performances have great value to the NSO.

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Beyond the critical influence of the three emergent factors (legal representation, knowledge of commercial rights, and no legitimate alternative) on the athletes' bargaining position, from a contractual perspective these factors also speak to the issue of consent. In theory, the enforceability of the commercial contents of the Athlete Agreement could be at issue, as a result of the athletes' lack of voluntary consent, which is evidenced by their lack of knowledge of their commercial rights and lack of an alternative to signing the Athlete Agreement. However, the results from this study suggest that in reality only those athletes with commercial appeal, who are missing out on commercial opportunities (such as Athlete#3 and #5), would have a reason to dispute the enforceability of the commercial contents for lack of consent.

Although the most commercially viable athletes appear to receive favourable treatment in terms of the application of their commercial rights, each athlete is still required to sign the same Athlete Agreement containing exactly the same commercial rights and obligations. The following section explores each party's perceptions of the negotiation process and examines the resulting commercial rights and obligations.

RQ 2: What are Each Party's Perceptions of the Results of the Initial Drafting and Negotiation Processes of the Athlete Agreement?

In theory, as a result of the structural power imbalance between NSOs and athletes (Foster, 2003), the absence of a formal bargaining process with the athletes, and the use of a standard form contract, NSOs have the ability to exploit athletes' commercial rights through the Athlete Agreement. However, as the findings demonstrate, in practice the commercial terms were, with one exception, reasonable. The results from this

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research question are divided into two sections. The first section examines each party's perception of the negotiation process. The second section explores each party's perception of the commercial rights and obligations as set out in the Athlete Agreement. This section begins with a brief analysis of the Athlete Agreement in comparison to the former 2007/2008 Athlete Agreement.

Perceptions of the initial drafting and negotiation processes. The exclusion of the athletes, Athletes' Council and agents from the initial drafting process of the Athlete Agreement, was not seen as an issue by any of the parties. However, parties differed in their perspective as to how the negotiation process should have proceeded. The following section outlines each party's perception of the negotiation process and discusses factors influencing the athletes' bargaining position.

Athletes' Council's perceptions. The Athletes' Council representative (i.e., Athlete#1) believed that, as the representative body for the athletes, members of the Athletes' Council should be directly involved in the negotiation process. He suggested that throughout the year he does discuss commercial rights with the Chief Executive Officer (CEO) and he does believe that his discussions, and subsequent suggestions, were factored into NSO1's decision making around the content of the Athlete Agreement. But to effectively represent the athletes' interests, he feels he needs to be included in the negotiation process.

Athletes' perceptions. With the exception of Athlete#4, who was informed by his agent, the athletes initially struggled to discuss what they thought about the negotiation process, in large part because they knew very little about it. Athlete#2 claimed that he

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had no idea what the negotiation process was nor did he have any idea how the commercial rights and obligations were decided. Moreover, Athlete#3 explained “I just feel like I know so little about it, and I kind of just, I guess I’m naive and I’m hoping the way they’re doing it is the best way to do it.” As a result of the athletes’ minimal understanding of the process, during their respective interviews the athletes were informed of the process and subsequently were asked to comment what they thought about it. The responses from the athletes revealed their lack of initiative to engage in the negotiation process, and their belief that the agents’ involvement enhanced their bargaining position.

Athletes’ lack of initiative. The athletes suggested that although they feel they need to have more of a voice in influencing the contents of the Athlete Agreement, none of them demonstrated a desire to personally get involved in the negotiation process. In commenting on the athletes’ lack of involvement in the negotiation process, Athlete#3 stated:

Even if athletes were allowed to be a part of it [i.e., the negotiation process] and have a voice, I feel like so many [athletes] probably wouldn't get involved. We [do] think about the things we hate, but at the same time I’m always like, oh I’m so tired from practice I don’t really want to respond to you people.

Athlete#3 further discussed why he would not get involved stating, “I feel if it was easier to be involved, then personally I would get involved, but that’s not the case.”

Athlete#2 noted that he had no interest in getting involved in the negotiation process but he was uncomfortable knowing NSO1 had final say on the commercial terms. He suggested that measures needed to be adopted to ensure that someone was involved to

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protect the athletes' best interests. Also commenting on the need for athletes to get involved in the negotiation of the commercial contents, Athlete#5 stated: "I mean, I don't know enough about my rights to get involved but some of the other top end athletes who do, should be included". Consistent with Athlete#5's comment, Athlete#4 suggested that the top 10% of the national team or their agents should be included in the negotiation process because it is really only them who are affected by the commercial contents. Athlete#4 stated further, "luckily for me, my agent was involved because I didn't have the time."

A critical analysis of the athletes' perceived inability to participate in the negotiation process, despite their collective belief that athletes should be involved, suggests what they really want is to feel as though they have some power in the negotiation process, regardless of whether they decide to exercise that power directly or through some third party. In other words, although the athletes appear to be reluctant to get involved, they appear to at least want to know they have that opportunity. The following paragraphs shed further light on the fact the athletes want to feel more in control of the negotiation process and discusses why they are reluctant to get directly involved themselves.

Importance of the agents' involvement. The majority of athletes considered the agents' involvement important to enhancing their bargaining position with NSO1. As shared by Athlete#1, "the agents who worked with [Athlete#4] and [Athlete#7]⁴¹ at the time, worked with [NSO1] to get a good balance of making sure that the rights of both

⁴¹ Athlete#7 was not one of the athletes interviewed. He is referred to as "Athlete#7" to protect his identity and the identity of NSO1. Both Athlete#1 and Agent#1 acknowledged this athlete (Athlete#7), as another NSO1 athlete who had an agent.

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sides were met.” Athlete#5 made the point that athletes do not possess the ability of the agents to influence NSO1:

Well, I think it’s just they know what to look for where we really don’t...If you have an agent who looks through this and all sorts of other contracts, or a lawyer who understands contracts, then it would be more beneficial because, if it’s me writing to [NSO1] saying, “I’m not happy with certain terms”, it doesn’t have the same influence as an agent or somebody with power. They’ll pay way more attention to it [coming from an agent or lawyer].

While agreeing with Athlete#5’s comments, Athletes#2 and #3 each identified other ways in which the agents influenced the athletes’ bargaining position with NSO1. First, Athlete#2 identified that involving the agents creates separation between the athletes and NSO1, enabling the athletes to avoid one-on-one confrontations with NSO1. In speaking to this, Athelte#2 stated:

Agents do all of the negotiations; that keeps us from being the bad guys. It’s kind of like how our media liaison does for us, you know, if someone asks us for an interview or something like that, and we might not have the time or even not want to do it, so were like “let me ask my media liaison” or “can you please ask my media liaison”, making them have to schedule an appointment, and then you can say you don’t want to talk to them and he’ll be the bad guy and you don’t have to be the talker. So the agent would do some of the same except he’s doing it in the background with NSO1.

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Athlete#3 identified how he and other athletes are able to benefit from the few agents, by channelling questions to the few athletes who are represented by agents. According to Athlete#3:

Well, I don't know the laws and all that [referring to the commercial contents of the Athlete Agreement], but I know [Athlete#4] has an agent, so I'll be like, "hey [Athlete#4] what do you think about this?" And he'll be like, "well my agent says blah blah blah." So I guess yeah, his [i.e. Agent#1's] involvement does help everybody because Athlete#4 becomes more knowledgeable, and then other athletes become more knowledgeable through him and, it just sort of spreads.

Aside from demonstrating the athletes' perception that the agents improve the athletes' bargaining position, these two quotations also illustrate the athletes' apprehension to engage with NSO1. This apprehension seems, at least in part, to be driven by athletes' fear that confronting NSO1 could negatively influence their relationship with NSO1 and potentially influence their position on the national team. Athlete #3 captures this fear in the following statement:

I really don't want to make anyone mad at [NSO1], you know? They have a lot of control over what goes on for me, obviously not over how I perform, and they probably can't stop me from being on teams, but it's not very pleasant to have people in the upper echelon pissed at you because you've decided that what is in your best interest, isn't in the groups best interest.

In this quote Athlete#3 was referring to the position he felt he was in when faced with the decision whether to accept a sponsorship offer from an apparel company that was in conflict with NSO1's apparel sponsor. He felt pressured by NSO1 to decline the

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opportunity, as it was not in what NSO1 considered to be the best interest of the athletes as a group. He did subsequently reject the offer.

Agent's perceptions. Agent#1 commended NSO1 for including him in the negotiation process, suggesting that NSO1 was moving in the right direction in terms of respecting the commercial needs of the athletes. However, Agent#1 stated that, beyond the drafting of the Athlete Agreement, NSO1 should also incorporate the elite athletes and their agents in the negotiation of its sponsorship agreements with the private commercial sector. For example, Agent#1 suggested NSO1 should package one or two athletes into a negotiation whereby the corporate sponsor could create an individual partnership with those athletes in addition to the corporate sponsorship agreement with NSO1. He justified this suggestion by identifying the mutual benefit to the parties of this type of arrangement. According to him, by including the elite athletes in their corporate sponsorship agreements, not only would they be assisting their athletes in garnering sponsorship opportunities but they would also be avoiding the issue of their elite athletes signing commercial sponsorship deals with competing sponsors of NSO1. He further stated that had NSO1's corporate sponsor not offered his client, Athlete#4, an individual sponsorship, Athlete#4 would have signed with a competing sponsor (notwithstanding the Athlete Agreement explicitly does not allow this). This comment implicitly suggests that Agent#1 believed his athlete, Athlete#4, could enter into agreements in breach of his Athlete Agreement and NSO1 would not take action to prevent it.

Consistent with the athletes' perspective, Agent#1 explained that he feels most of the athletes have no interest in getting involved in the negotiation process because they are too busy with training and competitions. Further, while commending NSO1's

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intension to involve athletes in future negotiations, Agent#1 suggested that, in his opinion, there may be very little value in requesting feedback from all the athletes on the Agreement because the majority of them have little understanding of commercial rights and obligations. Instead, he believes the current process of involving the agents is the best solution to ensure the athletes' commercial needs are heard and considered by NSO1.

Although the agents' involvement in the negotiation process may have been effective in reducing the commercial restraints in the 2009/2010 Athlete Agreement, the agents' influence will only protect the interests of all of the athletes so long as one standard from agreement is used for all of NSO1's athletes. If NSO1 decided to negotiate separate contracts with its most prominent athletes (such as Athlete#4), then any influence of the agent would only affect those separate contract and not the standard contract administered to the rest of the athletes.

NSO1's perceptions. The representatives of NSO1 felt they were able to strike a delicate balance between their own needs and the needs of the athletes. According to NSO Representative#2 "our feeling is that this agreement is a very fair agreement and it really does try to look for the best interest of ourselves and our athletes". Further, NSO1 representatives believed that by including the agents in the negotiation process, they gained a better understanding of the extent to which the athletes required the use of their own image to seek out sponsorship opportunities. According to both NSO1 representatives, it is their plan to get the athletes involved the next time they review the commercial rights and obligations of the Athlete Agreement while still continuing to involve the agents in the negotiation process. As an indicator of their willingness to do this they claimed they would work with the athletes to find a more opportune time to

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engage the athletes, unlike the timing of the past review. NSO Representative#2 explained:

I think that their [i.e., the athletes'] representation was far below what we would have wanted from them but it's just a process that, when we go through next time, we may even be a bit more direct in how we approach them.

NSO Representative#1 also commented on NSO1's influence on the athletes' lack of involvement in the process stating:

I think we made a few assumptions on the amount of feedback that we would get but people get very busy. So I think probably the one negative aspect [of the negotiation process] is that we did not get the appropriate feedback that we could have got.

Concluding perceptions. To summarize, despite the athletes' lack of involvement in either the initial drafting or negotiation processes, they did believe the agents generally represented their interests. The athletes believed the agents' status as professionals, their experience in negotiating, and their knowledge of commercial rights translated into leverage to more effectively represent their commercial interests.

Although Agent#1 identified that not all of the changes he suggested were accepted by NSO1, overall he was content with the outcome of the process. Despite NSO1 agreeing with the athletes that the agents' involvement was beneficial to the athletes' bargaining position, NSO1 still suggested that moving forward direct athlete involvement in the negotiation process was desired.

The fact that NSO1 plans to involve the athletes in future negotiation processes of the commercial contents, despite being satisfied that the involvement of the agents lead to

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an equitable exchange of commercial rights, might suggest that NSO1's purpose for the negotiation process may be to address the athletes desire to be heard, in as much as it is to update the commercial contents of the Athlete Agreement. If this is the case, then NSO1 and the athletes appear to be on the same page in terms of how to improve the negotiation process (i.e., giving the athletes an opportunity to be heard). Nonetheless, this improvement will likely not materialize unless the athletes' apparent inertia to get involved or exact change, which comes as a result of time commitments, lack of interest, lack of knowledge, and to a large extent fear of retribution, can be resolved. The resolution of which, may require NSO1 to take steps to resolve the athletes' fears of retribution, and may require the athletes to assume some accountability for representing their interests.

Analyzing the 2009/2010 NSO1 Athlete Agreement. The Athlete Agreement used in 2009/2010 Athlete Agreement ("Revised AA"),⁴² was revised from the previous one used for the 2007/2008 quadrennial cycle (which, itself, was originally drafted in 2005/2006). According to NSO Representative#1, the main focus of the revisions to the current Agreement from the preceding one was to address the commercial rights and obligations and make them more conspicuous to the athletes. The 2007/2008 Athlete Agreement (Former AA) was thus compared to the Revised AA.

Were the commercial contents of the 2009/2010 Athlete Agreement more conspicuous? The review showed that the commercial contents of the Revised AA were

⁴² For the purposes of this section only, NSO1's 2009/2010 Athlete Agreement, is referred to as "Revised AA." Furthermore, also for this section only, the 2007/2008 Athlete Agreement is referred to as the "Former AA." This "Former AA" was unchanged from 2005-2009.

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more conspicuous than in the Former AA. Unlike the Former AA, the Revised AA included a table of contents identifying where the commercial rights and obligations were addressed, it used sub-headings identifying where commercial terms were discussed within the general body of the agreement, and most importantly, instead of having one section of commercial rights and obligations within the body of the agreement, the Revised AA set out all of the commercial rights and obligations in a schedule (i.e., the “Sponsorship Schedule”) located at the back of the agreement. An objective review of both agreements suggests the commercial contents of the Revised AA are more easily identified, and therefore more athlete-friendly. However, since a majority of athletes did not read the Athlete Agreement, they were not able to comment on whether they found this Athlete Agreement more athlete-friendly.

Major changes to the commercial rights and obligations. The comparative review revealed three major changes. First, pursuant to s. 4.10 of the Sponsorship Schedule, NSO1 sponsors and licensees are now required to compensate athletes, at a mutually agreed upon rate, for the use of their image. This section replaces s. 6(c) of the Former AA, which enabled NSO1 to permit its sponsors and licensees to use the athletes’ commercial rights without compensating the athletes. Second, pursuant to s. 4.11 of the Sponsorship Schedule, NSO1 sponsors and licensees seeking to use an athlete’s commercial rights must use a minimum of three athletes unless the athlete authorizes a different arrangement. Third, pursuant to s. 4.09 of the Sponsorship Schedule, NSO1 now maintains the right to use an athlete’s commercial rights in perpetuity. This section replaces s. 6(b) of the Former AA, which limited the time NSO1 could use the athletes’ commercial rights to two years after the expiration of the contract.

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The first two major changes represent improvements from an athletes' perspective. Enabling the athletes to receive compensation for the use of their image and requiring sponsors to use multiple athletes in their advertisements results in more athletes being used and compensated by NSO1's sponsors and licensees. However, the third major change, NSO1's right to the athletes' commercial rights in perpetuity, is extremely onerous and significantly favours NSO1. Essentially, this clause gives NSO1 the right to use an athlete's image, video footage, or other likeness, for the rest of the athlete's life, regardless of how long or short his career is with NSO1. For example, images of Athlete#4 winning an Olympic medal may be used by NSO1 for promotional purposes, 30 plus years after the athlete retires from his sport. Yet Athlete#4 would have no claim to be compensated for the use of his image. Although this clause appears to be the only clause that stands out as overly restrictive, none of the parties commented on this clause. This is not surprising given that the athletes did not read the Athlete Agreement, and, in any event, did not necessarily understand the terminology. The fact that Agent#1 did not address this clause in his interview, and permitted his athlete to sign the Athlete Agreement notwithstanding the clause, suggests that either Agent#1 believed even his athlete would have no value in his image once he retired or, he ignored the clause possibly assuming it would not be enforced against his client or that it would be struck down by the courts if required.

Perceptions of the commercial rights and obligations set out in the Athlete Agreement. Despite the majority of athletes not reading the Athlete Agreement, each of the five athletes interviewed nonetheless believed the commercial rights and obligations

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set out in the Athlete Agreement favoured NSO1. The athletes' general understanding was that the Athlete Agreement granted NSO1 the ability to control the use of their commercial rights and that they received little to nothing in return. Upon drawing the athletes' attention to the exchange of commercial rights in the Athlete Agreement during the interview, the athletes reasserted their position that the exchange of image rights was very one-sided, in favour of NSO1 and second and more specifically, some identified that the exclusivity of competition attire granted to official sponsors unreasonably restricted their ability to attract individual endorsements. These two complaints are explored below.

Under the terms of NSO1's current Athlete Agreement, Sections 4.8 and 4.9 of the Sponsorship Schedule set out the exchange of image rights between NSO1 and the athletes. According to these sections:

4.8. [NSO1] irrevocably grants to the member, during the term hereof and while he or she is a member of [NSO1], the right to use the [NSO1's] name and its programs, with the exception of the [NSO1] uniform and [NSO1] logo or any other identified properties authorized by [NSO1] from time to time, unless the Member obtains prior written consent from [NSO1].

4.9. The member irrevocably grants, without charge, to NSO1 the right to permit or authorize, on a worldwide basis, NSO1 or any firm, person or corporation duly authorized by NSO1 to take and make use of any photographs, motion pictures or electronic images of the Member and/or other of the Member's Attributes. The Member agrees that NSO1 will thereafter own all rights to such images for the purposes of telecasts, webcasts, film or video documentaries, or features,

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advertisements or promotions of NSO1 programs and events, which may be used by the media for reportorial purposes, including but not limited to games programs or magazines, and which are focused on NSO1 and its marketing programs and not the individual member. This consent shall apply for the duration of the term hereof and while the member is a member of NSO1 and shall remain in effect indefinitely thereafter.

In speaking to this exchange of image rights,⁴³ NSO Representatives#1 and #2 each said they felt it was mutually beneficial and that, in fact, the athletes benefited from the use of NSO1's trademarks on a regular basis. In contrast, the athletes argued that the exchange was not mutually beneficial, as they did not benefit from the use of NSO1's image rights. For example, when asked how valuable the use of NSO1's trade name and trademarks were to him, Athlete#2 responded, "I don't think not being able to use [NSO1's] logo, would be a big deal. No one ever says that they are an athlete of [NSO1] they just say that they're Canadian [sprinters, skiers, kayakers, etc.] or Canadian Olympians." Athlete#5 explained that he believed the exchange of rights was inequitable because NSO1 had more autonomy to use an athlete's image than an athlete did to use NSO1's:

We do not have the same sort of rights to use that [i.e., the intellectual property of NSO1] as they do to use us. We can use the name, we can say [NSO] Canada, but I do not think we can actually use their logo or any team gear unless we ask for their permission; whereas, they don't need our permission.

⁴³ Reference to NSO1's "image rights" refers to their intellectual property (i.e., trademarks and trade name).

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Athlete#5 is correct. A review of the Athlete Agreement reveals that athletes must acquire permission to use NSO1's image, and NSO1 is able to use its athletes' images and likenesses commercially without asking the athletes for their permission. The Athlete Agreement also identifies that athletes are only granted the right to use NSO1's image throughout the term of their Athlete Agreement, while NSO1 maintains the right to use the athletes' images in perpetuity.⁴⁴ Both of the aforementioned terms limit an athlete's ability to freely exploit his or her image. The NSO representatives did not dispute the one-sided nature of the exchange of commercial rights. According to NSO Representative#2, "our sponsorships and activities we have around those sponsorships are always going to trump the athletes' needs. We are asking the athletes to sign off on that, and that's a hell of a statement." Although NSO1 acknowledges its advantage in the exchange of commercial rights, it defends itself in stating that the ability to use the athletes' commercial rights and favour their sponsors' interests is necessary for the sport system to survive. To an extent the athletes agreed with the NSO on this.

According to both NSO1 Representatives and Section 4.7 of the Sponsorship Schedule, NSO1 requires the use of its athletes' images to attract sponsorship dollars in order to sustain their organization and fund the services and programs it provides to its athletes. Although Athletes #2 and #5 felt it was not their responsibility to provide for NSO1's other athletes and programs, in all cases the athletes agreed that, to an extent, NSO1 does require the use of their images. Furthermore, regardless of the level of control NSO1 has over the use of their images, with the exception of Athlete#5, who was misled

⁴⁴ NSO1's right to use the athletes' images does not expire even after the athletes are no longer under contract with NSO1.

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by a third party that claimed to be given the right to use his image from NSO1, all of the athletes claimed they were not dissatisfied with the extent to which NSO1 actually used their image in the past. According to Athlete#4:

To this point, I do not have a problem with what they've done with our images.

It's kind of what I've expected. I think they can do more. They could always utilize us more, especially with their sponsors. But I haven't had a problem with what they've done.

To conclude on each party's perceptions of the fairness of the resulting commercial contents, the athletes did not believe NSO1 was abusing its ability to use the athletes' commercial rights to their detriment; however, they did view the exchange of commercial rights and obligations to be unfairly one-sided in favour of NSO1. In contrast to the athletes' perceptions, NSO1 argued the exchange was fair and a review of the Athlete Agreement suggested that, beyond part of a single clause set out in footnote 48,⁴⁵ the commercial content of the Athlete Agreement, and the overall exchange of rights and obligations between the Parties, appeared to be reasonable.

Summing up the Influence of the Structural Power Imbalance

To influence a contract requires bargaining power (Barnhizer, 2005). With the exception of the few elite athletes (such as Athlete#4) whose commercial value translated into leverage to influence NSO1, the other athletes appear to have no bargaining power as

⁴⁵ S. 4.9 of the Sponsorship Schedule. The last sentence of this clause states that "This consent shall apply for the duration of the Term hereof and while the Member is a member of [NSO1] and shall remain in effect indefinitely thereafter". These last two words raise some concern as they appear to be overly invasive, and it is possible that the courts would strike them out.

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a result of the structural power imbalance (i.e., NSO1 possesses all of the bargaining power). Using the framework of the unconscionability test, such an imbalance of power does not, in and of itself, render a contract unconscionable. However, if that imbalance is used to extract a grossly unfair, or one-sided agreement then, pursuant to the doctrine of unconscionability, that contract, or elements of that contract, could be unconscionable and, therefore, of no force and effect (Fridman, 2006). Despite the athletes' suggestions that the overall exchange of rights in the Athlete Agreement was one-sided, this study suggests that, with the exception of the one clause requiring athletes to grant NSO1 the ability to use their images rights indefinitely,⁴⁶ the commercial terms and resulting contract appears to be fair and reasonable. Based on this analysis, it can therefore be argued that despite the inequitable bargaining position of the majority of athletes, NSO1 does not appear to have used their monopoly position to extract an egregiously unfair agreement in their favour.

⁴⁶ Section 4.9 of the Sponsorship Appendix of the Athlete Agreement read: "...NSO1 will thereafter own all rights to such images... for the duration of the term hereof and while the member is a member of NSO1 and shall remain in effect indefinitely thereafter."

Chapter 5: Conclusions and Recommendations

This study applied the two tests that underlie the doctrine of unconscionability to frame the presentation of the research findings. These two tests are as follows:

1. is there a power imbalance between the contracting parties?
2. was that power imbalance used to extract an egregiously unfair contract?

Chapter 2 answered the first test by defining the structural power imbalance in high performance sport. In Chapter 2, it was established that, as a result of the monopoly NSOs possess over the competitive opportunities of high performance athletes, athletes find themselves in an inequitable bargaining position with NSO1. The second test forms the basis for a further exploration of the power dynamic involved in the negotiation and drafting processes of an Athlete Agreement and investigates whether other factors, including the degree of commercial appeal of the athlete, affects the negotiation and drafting process.

Based on the findings of Chapter 4, two main conclusions can be identified. First, it was confirmed that the inherent structural power imbalance in high performance sport does influence the bargaining relationship between athletes and NSO1. Second, other factors, beyond the structural power imbalance, influenced the negotiation of the commercial content of the Athlete Agreement.

The Structural Power Imbalance Influenced the Commercial Contents of NSO1's 2009/2010 Athlete Agreement

By implementing the unconscionability test to frame the presentation of this study's findings, the influence of the structural power imbalance on the commercial contents of the Athlete Agreement was confirmed. A critical examination of the results

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presented in Chapter 4 identifies that the structural power imbalance exerted two broad influences. First, it controlled the drafting and negotiation processes of the commercial contents. And second, the structural power imbalance contributed to the athletes' apathy towards improving their bargaining position. Each of these conclusions will be discussed in turn, followed by a discussion on how these influences of the structural power imbalance affect the enforceability of the Athlete Agreement from a contractual perspective.

Power imbalance controlled the drafting and negotiation process. The stability of the high performance sport system depends on its governing bodies operating as monopolies. As a cog in this system, all Canadian NSOs, including NSO1, possess a monopoly over competitive opportunities in their respective sports, and this will be so until the very structure of high performance sport changes. Given its monopoly power, NSO1 unilaterally determined how the drafting and negotiation processes of the Athlete Agreement would proceed. This involved deciding which parties would be involved in these processes, what their involvement would be, and when it would take place. For example, NSO1 did not involve the athletes in the drafting and negotiation of the commercial contents; instead it only involved the two agents representing NSO1 athletes, Agent#1 and one other sport agent. Although the NSO representatives stated the drafting and negotiation processes of the Athlete Agreement were open to all parties interested in providing feedback on the commercial contents, the fact that none of the athletes received a copy of the initial draft, and that the drafting and negotiation processes were held during the peak of the athletes' competitive season, suggests NSO1 was not particularly concerned with the feedback of a majority of the athletes. Instead, it could be argued that,

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by including only those agents representing NSO1's elite athletes in the negotiation process, NSO1 may have been concerned with meeting the needs of only the few elite athletes (such as Athlete#4) who would be most affected by those contents. Despite the agents' apparent involvement to represent the elite athletes' interests, NSO1 still protected its control over the negotiation process by maintaining the final say (i.e., a veto) on all suggestions received from the agents.

The structural power imbalance dictated the commercial contents. A further influence of the structural power imbalance was the ability of NSO1 to dictate the contents of the Athlete Agreement, including the commercial rights and obligations. Unlike the constraints limiting North American professional team leagues' (NHL, MLB, NFL), irrespective, such as mandated collective bargaining processes, NSO1 faced no such constraints.

The ability to control the drafting and negotiation processes of the Athlete Agreement is a bargaining power advantage that NSOs will continue to enjoy under the high performance sport structure. Unlike the constraints limiting North American professional team leagues' (NHL, MLB, NFL, and NBA) control over their respective contracting processes, such as labour legislation mandating collective bargaining, NSOs face no such limitations. As a result, within the high performance sport structure high performance athletes find themselves in a weak bargaining position to influence the commercial contents of their Athlete Agreement. Furthermore, as the following conclusion demonstrates, even if NSO1 were to provide the majority of athletes with the opportunity to influence the commercial contents, that the structural power imbalance has the effect of discouraging them from getting involved.

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As a result, NSO1 was able to draft a standard form contract proffered to the athletes on a take-it-or-leave-it basis. In other words, once NSO1 determined what commercial rights and obligations to include in the Athlete Agreement, terms became a final and binding offer to the athletes. Although the few elite athletes, such as Athlete#4, appear to have been given greater flexibility in the operation of the terms of the contract, even those athletes were forced to accept the written terms if they wished to compete for NSO1.

From two perspectives, critical and contractual, one has to query whether the athletes' acceptance of the commercial terms without dispute, represents consent to the commercial contents. As discussed in previous Chapters, consent requires elements of both knowledge and choice (Bix, 2008). The following section answers the athletes' understanding of how the structural power imbalance influenced their behaviour towards dealing with NSO1, and how those behaviours influenced the contractual issue of consent.

The structural power imbalance as reflected in the athletes' behaviours. In Chapter 4, three factors contributing to the athletes' inequitable bargaining position were identified: athletes' lack of knowledge of their commercial rights, athletes' lack of legal representation, and athletes' lack of a legitimate alternative to signing their Athlete Agreement. Although the third factor was identified as being a direct result of the structural power imbalance and therefore beyond the athletes' control, it was identified that the influence of the first two factors could be mitigated by the athletes taking the initiative to educate themselves about their commercial rights and by making an effort to engage in the Athlete Agreement drafting process to represent their own interests. Nonetheless, the athletes did not express interest in taking either of those initiatives to

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increase their bargaining position despite all suggesting they felt the exchange of commercial rights in the Athlete Agreement was unfair. An analysis of these conclusions suggests two rationales for the athletes' lack of initiative to enhance their bargaining position: first, the athletes have a certain antipathy because things have been done for them in the past (i.e., they have been taken care of and have become accustomed to being dependant on the NSO). And second, they choose not to get involved based on a fear of retribution by NSO1.

Dependent on NSO1. One rationale for the athletes' general lack of initiative to influence their bargaining position with NSO1 is that it would appear that the athletes have become accustomed to not having any involvement in the drafting of the Athlete Agreement. On the one hand, the athletes took the position that NSO1 controlled what contents would be included in the Athlete Agreement and there was nothing they could do about it, therefore it was a waste of their time to attempt to get involved. Some athletes chose not to read the Athlete Agreement because, according to them, they knew it did not matter if they disagreed with any of the content, if they did not sign it they would be precluded from participating on the national team. On the other hand, by suggesting that they are too busy to try to get involved in influencing their commercial rights, and by further suggesting that they do not possess the ability to understand the contents of the Athlete Agreement, despite acknowledging that they did not even read the Agreement, the athletes also appear to suggest that their understanding of how they fit in this high performance system is that their job is to train and compete to the best of their abilities, and everything else is left up to NSO1 to decide.

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Fear of retribution against their athletic opportunities. Another rationale for the athletes' general lack of initiative to engage in the negotiation of their commercial rights is a fear of retribution affecting their athletic opportunities. An analysis of the athletes' comments and actions suggests that, in part, the athletes are apprehensive to have any type of direct involvement with NSO1 for fear that it could negatively influence their position on the national team. Although throughout the interviews each athlete made comments about parts of the Athlete Agreement with which they had disagreements, and each commented on how they felt the negotiation process could be improved (which was basically that athletes should have more input), none of the athletes wanted to discuss these concerns with NSO1.

To the athletes, competing and achieving success on the international stage is their ultimate goal, and in understanding NSO1's monopoly position, they know they require the assistance and cooperation of NSO1 to achieve that goal. Despite selection procedures and dispute resolution policies put in place to protect athletes from being treated, these athletes still fear for their position on the team, and that confrontation with NSO1 may influence their experience on the team. For example, Athlete#3 passed up a commercial opportunity to avoid creating any animosity between himself and NSO1.

Influence of the structural power imbalance on the enforceability of the Athlete Agreement. As the above conclusions identify, the athletes' complacency and fear of retribution, both stemming from their understanding of the influence of the structural power imbalance, certainly contributed to their inequitable bargaining position, and subsequently their ability to mitigate the effects of the structural power imbalance.

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By choosing not to thoroughly read their Athlete Agreement, by assuming no responsibility for their lack of knowledge of their commercial rights, and by not voicing their concerns with the commercial contents, it could be argued that, regardless of the overarching influence of the structural power imbalance, the agreement ought to be enforced against the athletes as they made no apparent effort to enhance their bargaining position but instead accepted the commercial terms of the Athlete Agreement for what they were. For example, with respect to the application of Gillette's (2004) theory concerning information asymmetries, NSO1 may have been influenced to deal more equitably with the athletes even if only a few athletes read and understood the contents of the Athlete Agreement. In other words, it could be argued that despite the influence of the structural power imbalance over the contents of the Athlete Agreement, the terms should be enforced against the athletes because they accepted that they had no knowledge, they accepted that they had no leverage and, instead of trying to influence either of those factors, they simply signed the Athlete Agreement signifying their acceptance of the terms.

In contrast, from a contractual perspective the influence of the structural power imbalance on the athletes' ability to accept to the commercial contents cannot be overshadowed by the athletes' inertia to influence their bargaining position, because acceptance, at law, requires voluntary consent. As discussed in Chapters 2 and 4, voluntary consent requires both some form of knowledge of the terms of the agreement, and viable alternatives thus providing some choice. Despite the argument that the athletes' could have taken steps to gain the knowledge to make an informed decision on whether or not the terms of the Athlete Agreement were fair, they still had no alternative

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to signing the Athlete Agreement if they wished to compete in international competition. Therefore, in theory, the influence of the structural power imbalance raises what appears to be an irreconcilable issue of consent. Although, from a contractual perspective, there is an obvious concern that this lack of voluntary consent puts into question the enforceability of the Athlete Agreement, in practice this does not appear to be a true concern because the athletes who appear to be stripped of the ability to voluntary consent are not affected by the commercial content to such an extent that it would be worth disputing the enforceability of the Athlete Agreement on this basis's.

Other Factors, Beyond the Structural Power Imbalance, Influenced the Negotiation of the Commercial Content of the Athlete Agreement

This study identifies that the inherent power imbalance in high performance sport is only one factor affecting the athletes' ability to negotiate a fair and equitable Athlete Agreement with NSO1, albeit a significant one. The other factor is an athlete's level of commercial appeal.

The influence of athletes' level of commercial appeal. The results of this study confirm the suggestion of Findlay and Ward (2006) that an athlete's level of commercial appeal may influence the commercial contents of his or her Athlete Agreement. Agent#1 was invited by NSO1 to participate in the negotiation of the commercial contents of NSO1's 2009/2010 Athlete Agreement. As a result of his involvement, changes to the commercial contents were made in favour of the athletes. Despite the athletes' perception that Agent#1's knowledge of commercial rights and negotiating experience enabled him to influence the commercial contents, this study suggests the agents were able to

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influence the commercial contents of the Athlete Agreement for all athletes by effectively leveraging the commercial appeal of the athletes they represented.

The commercial landscape of the high performance sport system provides an important contextual background to the evolution of the Athlete Agreement. As a result of the increasing commodification of high performance athletes, the Athlete Agreement has increasingly evolved from a simple tool used to formalize the process of athlete funding (Beamish & Borowy, 1988), into a “full-fledged commercial contract” (Findlay & Ward, 2006, para. 5). However, this study demonstrates that the significance and impact of the commercial contents of the Athlete Agreement greatly varies depending on an athlete’s level of commercial appeal.

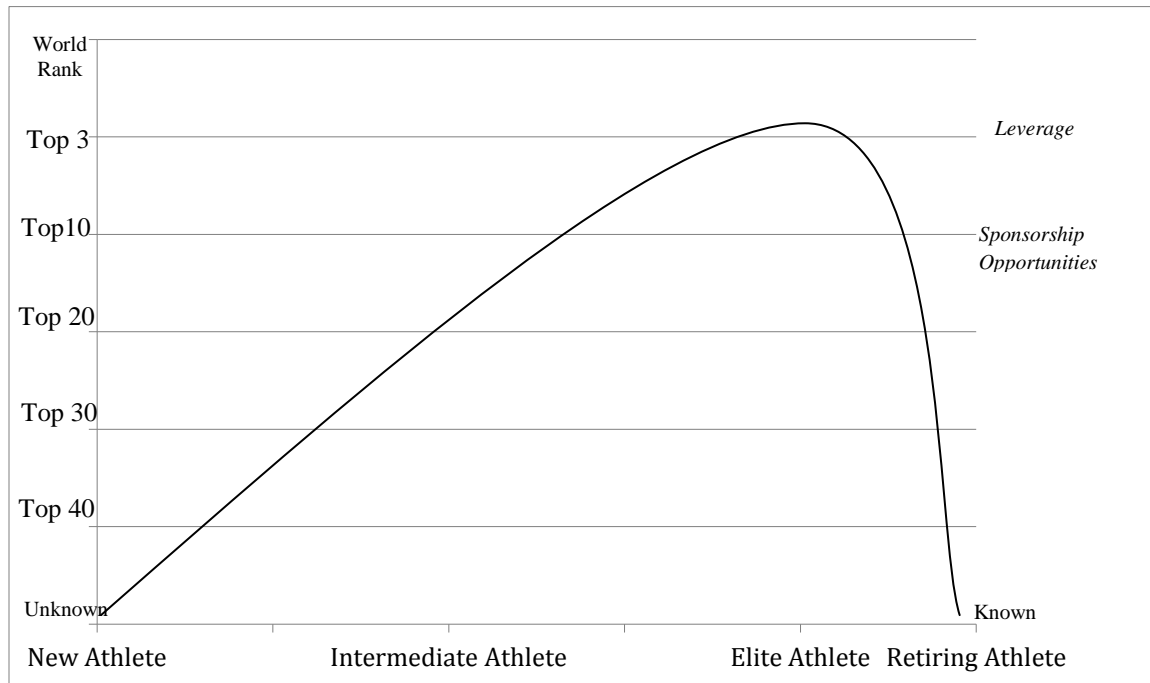
This study proposes that athletes find themselves on a ‘Commercial Appeal Continuum’ (the “Continuum”). This Continuum ranges from ‘unknown commercial appeal’ at one end, to ‘known commercial appeal’ at the other end, and suggests that as athletes move through their high performance career, their commercial appeal becomes more knowable to both the athletes and NSO1. The significance of the Continuum is that, as their commercial appeal becomes more knowable, the commercial content of the Athlete Agreement become more applicable and therefore understanding those commercial contents and obtaining an agent or another form of legal representation to represent the athlete’s interests becomes increasingly important. This is not to suggest that understanding the commercial contents of the Athlete Agreement is unnecessary for those athletes with unknown commercial appeal. Rather, the Continuum is designed in response to the results in Chapter 4, which suggest that until athletes achieve a certain level of performance success (i.e., move towards the “known” end of the Continuum),

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they are not truly affected by the commercial contents, nor do they possess any leverage to negotiate a more favourable application of those contents with NSO1.

As previously discussed, as a result of the structural power imbalance, in theory, athletes have no leverage to deal with their commercial rights, and subsequently no ability to voluntarily consent to the commercial terms of the Athlete Agreement, because, if they wish to compete in their sport internationally, they have no alternative to signing the Athlete Agreement. However, the Continuum reflects the reality of high performance sport, which appears to be that athletes who achieve a certain level of performance success and possess sufficient knowledge of their commercial rights (which may be accomplished through an agent), do have leverage to deal with their rights and subsequently can voluntarily consent to the commercial terms of the Athlete Agreement.

The following paragraphs attempt to explain the reality of the position of high performance athletes, shedding light on why the theoretical inconsistencies between the contract principle of voluntary consent and the function of the structural power imbalance has thus far been avoided.

Figure 5-1: Commercial Appeal Continuum

The Continuum largely reflects an athlete's level of experience and performance success in his or her sport. For the purposes of this study, performance success was used as the sole variable to determine an athlete's level of commercial appeal. As such, as the athlete improves his or her performances, he or she moves along the Continuum towards more knowable commercial appeal. New Athletes (i.e., athletes who are signing their first Athlete Agreement) would typically find themselves at the 'unknown' end of the Continuum because they would have minimal, if any international results from which to judge commercial appeal. Intermediate Athletes (i.e., athletes who have previously signed at least one Athlete Agreement and are assumed to be on the ascendancy of their career path), would have by now competed in multiple international competitions, achieved a certain level of success and, as a result, would be moving towards the 'known' end of commercial appeal. Retiring Athletes (i.e., athletes who have signed multiple Athlete Agreements and are moving to the end of their careers), are at the 'known' end of the

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Continuum and, at this point, may no longer be a commercial commodity. Finally, Elite Athletes (i.e., those with a corporate sponsor), are also at the ‘known’ end of the Continuum, however, unlike the Retiring Athletes, these athletes are a commercial commodity with established commercial appeal (defined, to an extent by the sponsorships they possess).

The Continuum reflects the degree of leverage an athlete possesses to deal with his or her commercial rights. A ‘New Athlete’ with little known commercial appeal has little or no leverage with which to negotiate the terms of their Athlete Agreement or the application of those terms. This position is akin to new artists in the music industry who are signing their first record deal. Research on these new artists suggests that their recording contract is “highly symbolic...denoting both a badge of honour (that the artist is one of the chosen few) and providing a chance of success in a competitive market” (Greenfield & Osborn, 2007, p. 5). Similarly, these New Athletes, at the beginning of their competitive careers, do not yet recognize the legal significance of their Athlete Agreement, nor do they necessarily think it matters, because, to them, the Athlete Agreement is largely symbolic. To them, the act of signing their Athlete Agreement represents ‘making it’ to the next level in their athletic pursuit. The issue of voluntary consent is never approached predominantly because they possess no commercial appeal, therefore the commercial contents do not affect them. Moreover, as a result of their lack of commercial appeal, the New Athletes have no leverage to negotiate and are completely controlled by the structural power imbalance.

Moving along the Commercial Appeal Continuum, the commercial contents become more relevant and the Athlete Agreement becomes less symbolic and more

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representative of a traditional contract. Intermediate Athletes' (e.g., Athletes#3 and #5) performance in international competition is on the rise, and they are beginning to recognize commercial value in their image; however, their commercial appeal is still relatively unknown. As they achieve competitive success their value, and subsequent leverage to negotiate the application of their Athlete Agreement with NSO1, grows. At this point in their career, despite acknowledging the legal significance of the Athlete Agreement, they are still prepared to execute the Agreement without fully understanding the extent of their rights (or the obligations they may be undertaking). Their rationale for signing the contract is that they believe it really does not matter how onerous the terms may be, they feel obliged to sign in order to get the support of their NSO and, more importantly, they know they have no other option if they wish to compete.

Finally, for the Retiring Athletes (e.g., Athletes#1 and #2) and Elite Athletes (e.g., Athlete#4) the Athlete Agreement is clearly understood to be a legal contract. The Retiring Athletes understand the legal significance of the Athlete Agreement but are not concerned with the commercial content because they appreciate they have diminishing commercial appeal, if any at all. The Elite Athlete also understands the legal significance and is more concerned with the commercial contents to the extent he has his legal representative actively taking part in shaping those contents (and has the resources to attract and retain a representative). Indeed, through the efforts of Athlete#4's agent, Agent#1 was able to negotiate a more favourable application of the commercial terms of the Agreement.

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In summary, the Commercial Appeal Continuum demonstrates what role the structural power imbalance plays in shaping the bargaining position of athletes at different points in their athletic career. The New and the Retiring groups of athletes are completely controlled by the structural power imbalance as they have no leverage to influence the commercial contents of their Athlete Agreement, and thus no viable alternative to accepting whatever commercial contents are included in their Athlete Agreement by NSO1. Nonetheless, their ability to voluntarily consent to the commercial contents is of no practical concern to NSO1 because neither group of athletes is particularly affected by the commercial content.

The Elite group of athletes, in contrast to the New and Retiring groups, appear to have achieved a level of performance success that balances out the influence of the structural power imbalance. These athletes do possess sufficient leverage to influence the commercial contents (or at least how that contents is applied), and do voluntarily consent to the commercial terms.

Finally, the Intermediate Athletes, similar to the New and the Retiring Athletes, are completely controlled by the structural power imbalance because they have not reached a level of performance success to possess leverage over NSO1, and are therefore unable to influence the commercial contents of the Athlete Agreement. However, unlike the New and the Retiring Athletes, the commercial content of the Athlete Agreement may actually affect the few Intermediate Athletes moving towards Elite Athlete status, and so the inability to voluntarily consent to the commercial contents could create a potential issue from a contractual perspective. Nonetheless, as long as NSO1 continues to offer a standard form contract to all of its athletes, the influence of the Elite Athletes' level of

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commercial appeal on both the negotiation process and the resulting commercial terms incorporated in to the Athlete Agreement, should prevent a grossly unfair or one-sided Athlete Agreement, and therefore, prevent an enforceability issue from developing.

In practice, NSOI's application of the Athlete Agreement appears to effectively govern the commercial exchange of image rights between it and its athletes. Nonetheless, as a result of the theoretical incompatibility of the structural power imbalance with contract theory, until the day that an athlete challenges the enforceability of the Athlete Agreement for lack of voluntary consent, it will remain difficult to determine just how effective and appropriate a tool the Athlete Agreement is in governing the commercial rights and obligations of high performance athletes.

Future Research

The research methods, findings, and resulting conclusions presented in this study serve as building blocks for future research. The following paragraphs discuss how components of this study point to important areas for future research.

During the case selection phase of this study, the pool of potential cases was limited to Canadian NSOs representing individual sports, excluding team sport NSOs (e.g., Soccer Canada and Baseball Canada, etc.). This decision was made based on the review of literature, which identified that the majority of disputes concerning Athlete Agreements were made by individual sport athletes (Kari, 2000; "Skaters Resolve", 1988; Stubbs, 1993; Dimanno, 2013). Nonetheless, there have been multiple Athlete Agreement disputes in Canadian team sport NSOs ("Curlers", 1987; Davidson, 2001) and thus, looking at team sport athletes and NSOs would not only provide an interesting

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comparator case, but it would contribute to a greater understanding of the influence of the structural power imbalance on Canadian NSOs.

The results of this study suggested that an athlete's level of commercial appeal was an influential factor in predicting the ability of high performance athletes to influence the commercial content of their Athlete Agreements. The sole construct used to predict potential athlete interviewees' level of commercial appeal was athletic performance. Although the results in this study support Séguin, Teed, and O'Reilly's (2005) suggestion that athletic performance is the most important variable in determining an athlete's level of commercial appeal, this study identified that commercial appeal is not a unitary construct. As an example, Athlete#5 was presumed to have as much or more commercial appeal based on his performance results, nonetheless, according to Agent#1, he just did not possess all of the characteristics (characteristics which he did not divulge), to make him a commercial commodity. Future research should look at additional variables that may influence commercial appeal. Given the advancements in social media technology since this study was first commenced in 2008, particularly in the areas of marketing and sponsorship, an interesting construct might be an athlete's number of Twitter followers or the number of "likes" on their Facebook fan page. as a measure of commercial appeal.

Finally, literature on high performance sport suggests that many athletes are concerned with their inability to influence the content of their Athlete Agreement (Beamish & Borowy, 1988; Macmillan, 1990; Peel, 2010). However, the results of this study show that the importance of the commercial content of the Athlete Agreement and the ability of an athlete to influence that content largely depended on the stage at which

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the athlete was in his career. In response to this finding, a 'Commercial Appeal Continuum' was developed. Based on the small sample size and the absence of any 'New' high performance athletes (i.e., those signing their first Athlete Agreement) in this study, the applicability of this continuum has yet to be verified. Such future verifying research should maintain the single case study design but engage a much larger sample size, including a range of athletes from new athletes to retiring athletes.

Conclusion

This study focused solely on the commercial clauses in the Athlete Agreement to explore the influence of the structural power imbalance in high performance sport. However, there are many other clauses in the Athlete Agreement that are influenced by the structural power imbalance and that subsequently effect the rights of the athletes. Everything from the doping clauses, to the mandatory arbitration clause, to elements of the code of conduct, all restricts athletes' general freedoms. Unlike the commercial clauses, the influence of the structural power imbalance on these other clauses is not mitigated by the influence of an elite athlete such as Athlete#4; rather the contents of these other clauses are non-negotiable. Although the results of this study revealed that from a contractual perspective the use of the Athlete Agreement within NSO1's monopoly continues to be problematic, in practice the enforceability of the commercial restraints are unlikely to be challenged. This is because those who are truly affected by the commercial restraints have sufficient bargaining power to conceivably negotiate with NSO1 and eventually come to a mutual agreement, wherein the athlete is capable of consenting to the commercial terms. Furthermore, for the remaining athletes who

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arguably have not voluntarily consented to the commercial contents of the Athlete Agreement, it is unlikely that the enforceability of the Athlete Agreement would be challenged because from a commercial perspective, they remain unaffected and it is not of any true concern to them. In contrast, as a result of the overarching influence of these other clauses on all of the athletes, and the athletes inability to influence those clauses, the analysis of the structural power imbalance would be slightly different and the issue of consent much more important in both theory and practice.

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Appendix A: Semi-Structured Interview Guide

- From your understanding what is the purpose of the Athlete Agreement? How has the athlete agreement changed?
- Why do you think Athlete Agreements include a section on commercial rights and obligations?
- Do you think the AA itself should include commercial terms? Or should the commercial terms be a separate contract? Why or why not?
 - American athlete agreement + sponsorship agreement? (familiar due to your work with Nike in the states)
 - Are [NSO1] athletes commercially viable?
 - Do the commercial obligations in this AA prevent your athletes from finding personal sponsors?
 - Does the organization need to seek sponsorship?
- Why did [NSO1] decide to conduct a thorough revision of its Athlete Agreement?
 - Past appeal?
- Who was involved in developing the commercial rights and obligations?
- How are the commercial rights contained in the Athlete Agreement decided?
- How were you involved in the development of the agreement? Who did you consult with from [NSO1] directly?
 - ([CEO's name], lawyers etc.)
 - When did you receive the AA?
 - How do you communicate your concerns with your client and NSO1?
 - What are your perceptions of how the Athlete Agreement is presented? Would you change anything about the presentation of the Athlete Agreements?
 - What are your perceptions about the process used to draft the commercial rights and obligations in this past AA? Should there be more athlete influence/negotiation?
 - Would you change anything next time around?
 - Do you think the process is fair? Should the process change?

Now to talk more about the content of the agreement...

- What are your thoughts on the current extent that [NSO1] is able to use your/your clients' image for commercial purposes?
 - In your opinion are there any unreasonable restraints in the current AA?

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- How does [NSO1] manage the commercial interests of its athletes? Dispute resolution process?
 - Do they consult athletes individually?
 - How are post contract commercial opportunities communicated between NSO and athlete?
 - Are exceptions made to accommodate specific athletes?
 - How open is [NSO1] to making changes to the contract
- Have there been disputes over sponsorship opportunities and/or the use of an athlete's image in the past?
- Given the manner that the athlete agreement is designed, the structural power imbalance created by NSO1's monopoly status and how it does encompass much more than just commercial aspects is the athlete agreement actually a contract or more of an extension of the laws of the association?

or maybe a hybrid of both?

- The Athlete Agreement has undergone a variety of changes since it was first administered in 1984, predominantly the shift towards a commercial focus. How do you see the AA developing or changing in the near future, given the current landscape of high performance sport?

Appendix B: Letter of Invitation

LETTER OF INVITATION

September 1st, 2010

Title of Study: Bargaining Power Dynamics and the Negotiation of Commercial Rights and Obligations: A Case of Athlete Agreements.

Principal Investigator: Craig Arsenault, MA Student, Department of Sport Management, Brock University

Faculty Supervisor: Hilary A. Findlay, Associate Professor, Department of Sport Management, Brock University

Dear [Athlete/NSO Representative/Agent]:

My name is **Craig Arsenault** and I am a **graduate student (MA)** in the Department of Sport Management of Brock University. I would like to invite you to participate in a research project I am doing as part of my graduate degree, entitled **Bargaining Power Dynamics and the Negotiation of Commercial Rights and Obligations: A Case of Athlete Agreements.**

The purpose of the study is to develop an understanding of how the power dynamic between athletes and their respective NSOs influences the commercial content within the Athlete Agreement. In order to fully explore this purpose all parties involved in the negotiation and drafting process of the Athlete Agreement will be interviewed. This includes: athletes, Athlete Representatives, NSO representative, and athletes' agent/personal representative (if he or she has one and consents to the individual participating).

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As a participant, you will be asked to participate in a telephone interview with the Principal Student Investigator, i.e., myself. The content of the interview will pertain to your knowledge and experience of the drafting and negotiation process of the commercial contents of your NSO's Athlete Agreement. The emphasis will be on your perception of the influence each party has over the contents of the agreement, and a detailed recollection of any issues or concerns that you faced throughout the drafting and negotiation of the Athlete Agreement. Participation in the interview will take approximately 30-60 minutes of your time. The interview will be audio recorded and transcribed verbatim upon its completion. Shortly after the interview has been completed, I will send you a copy of the transcript in order to give you an opportunity to confirm that the content of the interview is factually accurate. If you have any issues with the interview transcript you can communicate them to me by email up to two weeks after receiving the initial email containing the interview transcript.

Possible benefits of participating in this study include engaging in a detailed conversation about your involvement and insights concerning the commercial aspects of your NSOs Athlete Agreement with a keen listener. As well, the completion of this research will help fill a gap in Canadian high performance sport literature regarding how the power dynamic of high performance sport in Canada influences the commercial contents of Athlete Agreements.

If you have any pertinent questions about your rights as a research participant, please contact the Brock University Research Ethics Officer (905 688-5550 ext 3035, reb@brocku.ca).

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If you have any questions, please feel free to contact me.

Thank you

Craig Arsenault
MA Graduate Student
(905) 397-7102
craig.arsenault@brocku.ca

Hilary A. Findlay
MA Supervisor
(905) 688-5550 Ext.4811
hfindlay@brocku.ca

This study has been reviewed and received ethics clearance through Brock University's Research Ethics Board (file # 09-255)

Appendix C: Informed Consent Letter

INFORMED CONSENT LETTER

Date: **June 30th, 2010**

Project Title: **Bargaining Power Dynamics and the Negotiation of Commercial Rights and Obligations: A Case of Athlete Agreements.**

Principal Investigator:

Craig Arsenault, Graduate Student

Department of Sport Management

Brock University

905-397-7102

craig.arsenault@brocku.ca

Faculty Supervisor:

Hilary A. Findlay, Supervisor

Department of Sport Management

Brock University

(905) 688-5550 Ext.4811

hfindlay@brocku.ca

Dear [Athlete/NSO Representative/Agent]:

INVITATION

You are invited to participate in a study that involves research. The purpose of the study is to develop an understanding of how the commercial rights and obligations set out in the Athlete Agreement are decided. In order to fully explore this purpose all parties involved in the drafting and negotiation process will be interviewed, which includes: athletes, Athlete Representatives, an NSO representative, and athletes' agent (if they have one and he or she consents to the agent participating).

WHAT'S INVOLVED

As a participant, you will be asked to participate in a semi-structured interview with the Principal Student Investigator. The content of the interview will pertain to your experience and perceptions of the drafting and negotiation of the commercial contents of your Athlete Agreement. Participation in the interview will take approximately 30-60 minutes of your time. The interview will be audio recorded and transcribed verbatim upon completion. Shortly after the interview has been completed, the Principal Student Investigator will send you a copy of the transcript to give you an opportunity to confirm that the content of the interview is factually accurate. If you have any content specific issues with the interview transcript you may communicate them to the Principal Student

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Investigator by email up to two weeks after receiving the initial email containing the interview transcript.

POTENTIAL BENEFITS AND RISKS

Possible benefits of participation include engaging in a detailed conversation about your experience and perceptions of the drafting and negotiation process of the commercial contents of your Athlete Agreement with a keen listener. As well, the completion of this research will help fill a gap in the Canadian high performance sport literature regarding how the power dynamic in high performance sport influences the commercial contents of the Athlete Agreement. As an independent participant you will not be subjected to any form of risk. Your responses in the interview will not be shared with any of the parties, and you will be assigned a pseudonym to prevent compromising your identity.

CONFIDENTIALITY

The information you provide will be kept confidential. Your name will not appear in any thesis or report resulting from this study; however, with your permission, quotations identifiable by your chosen pseudonym may be used. Data collected during this study will be kept in a locked location in the Department of Sport Management until they are completely transcribed and analyzed. Upon completion of the transcription and analysis of the data, the paper copies of the documents will be shredded. Digital copies of the files will also be deleted from the Principle Student Investigator's computer hard drive. The transcripts of the interviews will be kept for a period of five years for possible secondary use in future research within the same general area of study. Access to this data will be restricted to the Principal Investigator (Craig Arsenault) and the Faculty Supervisor (Dr. Hilary Findlay).

VOLUNTARY PARTICIPATION

Participation in this study is voluntary. If you wish, you may decline to answer any questions or participate in any component of the study. Further, you may decide to withdraw from this study at any time and may do so without any penalty or loss of benefits to which you are entitled.

PUBLICATION OF RESULTS

Results of this study may be published in professional journals and presented at conferences. Feedback about this study will be available from the Principal Student Investigator at the address above. It is anticipated this study will be completed by the end of August 2010.

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CONTACT INFORMATION AND ETHICS CLEARANCE

If you have any questions about this study or require further information, please contact the Principal Investigator or the Faculty Supervisor using the contact information provided above. This study has been reviewed and received ethics clearance through the Research Ethics Board at Brock University file # 09-255. If you have any comments or concerns about your rights as a research participant, please contact the Research Ethics Office at (905) 688-5550 Ext. 3035, reb@brocku.ca.

Thank you for your assistance in this project. Please keep a copy of this form for your records.

CONSENT FORM

I agree to participate in the study described above. I have made this decision based on the information I have read in this Information-Consent Letter. I have had the opportunity to receive any additional details I wanted about the study and understand that I may ask questions in the future. I understand that I may withdraw this consent at any time.

Name: _____

Signature: _____ Date: _____

Appendix D: Coding Key

Coding Key

Theory-driven Codes (A)

AAtype - the AA is a single contract that must be signed for an athlete to become a member of his or her respective NSO, and the commercial rights and obligations imposed on the athletes are a part of that contract.

AAtype1- commercial terms are components of the contract

AAtype2 – Commercial terms are laws/policies of the organization

AAtype3 – commercial section possess traits of a contract and of laws/policies

PImbalance- there exists an identifiable power imbalance between NSOs and Athletes in favour of NSOs (Beamish & Borowy, 1988; Buffery, 1998; Kidd & Eberts, 1982; Peel, 2010).

PImbalanceAA- influences the contents of the AA (Beamish & Borowy, 1988).

PImbalanceAD- influences athletes` decisions (Peel, 2010).

PImbalanceCO- influences commercial opportunities (Findlay & Ward, 2006).

PImbalance\$ - (Power Imbalance for Monetary Gain) - drafting party is more likely to use its bargaining power advantage to seek out monetary gains rather than to insert unfair terms that reduce the value of the contract to the adhering party (Posner, 1992). Pg. 22

AFrust- Athletes are frustrated over issues surrounding AA (Buffery, 1998, ¶ 2) pg.4

AFrust1- Frustrated because of power imbalance

AFrust2 – Frustrated with the process of communicating with [NSO1]

Issues- there are identifiable issues that need to be addressed in the AA (Buffery, 1998, ¶ 2)

Issues1- using equipment from a competing sponsor

Issues2- [NSO1] problems with athletes Contents of the agreement

Issues3- athletes confronting [NSO1]

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Issues4 – General issues in AA

Issues5- [NSO1] using athletes image

AAcomplexity- AAs are becoming more complicated (Smith, 1998, p. A19). Pg.4

ICC- (Impact of Commercial Constraints) – commercial constraints in the AAs are preventing athletes from earning a living off their image (Kari, 2000, p. 58). Pg 4

NSOUnCon- (NSO Unreasonable Constraints) – NSOs are unreasonably constraining athletes' opportunities to exploit their image for commercial gain (Peel, 2010).

NSOUnCon1- constraints imposed due to obligations to corporate sponsors

NSOUnCon2- constraints requiring appearances on behalf of [NSO1]

NSOUnCon3- use of the athletes' image without compensation

AthletesInput – there are mechanisms in place for athletes to provide their NSO with some input concerning their AA (Foster, 2003). Pg. 13

ARepInfluence – the athlete rep has little to no influence over the contents of the AA (Beamish & Borrowy, 1988; Ekos Research, 2005). Pg 36

SponsorInfluence – corporate sponsors influence the commercial rights and obligations in the AA

NSODevelop- the AA are typically developed solely by leaders of the NSOs, who are free to restrict the athletes' rights to the extent that they feel is necessary (Beamish, 1988). Pg. 29

AASFC- (AA is a Standard Form Contract) – the AA is a non-negotiable contract drafted by one party and presented to the other party in many circumstances on a take-it-or-leave-it basis (Marotta-Wurgler, 2007). Pg.5

AConcern- Athletes are concerned about the limited freedom to exploit their image for personal gain (Buffery, 1998; Findlay & Ward, 2005; MacMillan, 1991, Peel, 2010).

NSOLevA –(NSO Leverage Athletes)- commercial clauses enable NSOs to leverage their “top” athletes images as commodities to attract corporate sponsorship (Chalip, Johnson, & Stachura, 1996; Walsh & Giulianotti, 2007). Pg. 7

NSOInt1st- (NSO Interests come First) - monopolies, such as NSO, will typically use their structural power to favour their own interests (Foster, 2003; Hanlon, 2007). Pg. 10

NSOMonopoly – NSOs are understood to be monopolies (Foster, 2000). Pg. 11

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VolAccept? – (Voluntary acceptance)- adherents to a SFC do not voluntarily accept the terms of the contract, rather they are forced to accept in lieu of no other option (Llewelyn, 1931; Rakoff, 1983; Slawson, 1971; Fried, 1981) . pg 22

InfoAssymetry (Information Asymmetry) – SFC should not be used by a monopoly because it typically involves an information asymmetry between the contracting parties which, in turn, allows the drafting party to insert specific restrictive clauses that often go unnoticed by the adhering party. Such restrictive clauses go unnoticed because of time constraints or intentionally ambiguous language used by the drafting party (Cruz & Hinck, 1996; Hillman & Rachlinski, 2002; Korobkin, 2003). Pg. 22

Protections? – athletes have little to no protection from the powers of their respective NSO (Beamish & Borowy, 1988; Blackshaw, 2009; Kidd & Eberts, 1982; Mitten, 2009; Weston, 2009). Pg 23

ImageConflict – the transfer of image rights between athletes and their NSO has created conflicts between the two parties.

PromAthletes (Prominent Athletes) –prominent athletes (i.e. former Olympic medallists and/or upcoming Olympic favourites) who are represented by legal counsel may be able to leverage their status and to modify the commercial constraints imposed on them through their Athlete Agreement (Corbett, Findlay, & Lech, 2008). Pg. 29

AgentI- athletes represented by an agent or legal counsel have more negotiating leverage (Corbett, Findlay, & Lech, 2008) pg. 29

AgentI1- influence the commercial contents of the agreement

AgentI2- influence the relationship between athlete and NSO

AgentI3- agent's influence is beneficial to all athletes

PROProtect- professional athletes have further protections available to them in comparison to HP athletes (Mitten & Davis, 2008; Weston, 2009). pg. 30

AthletesComV – Athletes are commercially viable, and able to attract corporate sponsorship with the use of their image (Cloete, 2005) pg 27

AAComFocus - Athlete Agreements continue to focus more and more on the commercial content (Findlay & Ward, 2005)

Unique - High performance athletes are in a very unique position in terms of their rights and opportunities, and protections, in comparison to employees and pro athletes.

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2Contracts- the American model of using 2 separate contracts, the AA and a separate commercial contract, is the more appealing to athletes and less appealing to NSOs.

(--) Two dashes preceding a code means that the opposite of what the code suggests occurred. For example -- **AAComFocus** indicates that the AA is not focusing more on commercial content than it had previously.

Data-driven Codes (DD)

?: Does not understand/unable to answer the question because of lack of information

PI: Discussing Power imbalance

-NSO: Negative perception of the NSO: -NSO

+NSO: Positive perception of the NSO

-Athlete: Negative perception of the athlete

+Athlete: Positive perception of the athlete

Oned: Discussing organizations needs

Aneed: Discussing Athletes needs

LEV1: NSO's leverage over athletes

LEV2: Athletes leverage

ImprovePro: Suggestion to improve drafting and negotiation process

ImprovePro1: Balance the decision making

ImprovePro2:Sponsorship Purposes

-Commun: Poor communication between athletes and NSO

+Commun: Good communication between athletes and NSO

-RELAT: Negative relationship between parties

Relat1: Negative relationship between athlete and NSO

Relat2: between NSO and Sponsor

+RELAT: Positive relationship between athlete and NSO

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COMPARE: Comparing HP sport, to other levels of competition (pro, American HP etc.)

+Process: Positive perception of the drafting and negotiation process

-Process: Negative perception of the drafting and negotiation process

C?: Contract or extension of the laws/policies debate

PAA: Discussing past AA without comparing

D&N: Discussing the drafting and or negotiation process

DCO: Discussing commercial opportunities

DCRO: Discussing commercial Rights and Obligations

Adispute: Athlete dispute